

STATES OF RESISTANCE

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The Trump administration has drawn an unflattering spotlight on what long had been a dormant feature of federalism—there are deep fissures between the federal government and leading state governments on questions of foreign policy. The confrontation between states, led by California, and the United States federal government regarding climate change policy puts these fissures on full display.² California has assumed the mantle of defending the Paris

2. Nadja Popovich, *California Is Ready for a Fight Over Tailpipe Emissions. Here's Why*, N.Y. TIMES (Apr. 30, 2018), <https://www.nytimes.com/interactive/2018/04/30/climate/california-auto-emissions.html>.

Agreement on climate change against its express disavowal by the federal government.³

Initiatives such as these by California and other like-minded states raise significant constitutional questions. The Supreme Court has noted that states should not impair the President's ability to "speak for the Nation with one voice."⁴ But as the headlines proclaim, *California and Washington State Join Carbon Pledge in Defiance of Trump*.⁵ They have done so, for instance, by joining "five nations on the Pacific coast of the Americas on Tuesday to agree to step up the use of a price on carbon dioxide emissions as a central economic policy to slow climate change."⁶ California is acting on its pledge by implementing state law to that effect.⁷ California is thus defying federal foreign policy by entering into its own agreements with foreign states and implementing its own laws to have an impact on foreign policy. This is facially difficult to reconcile with the Supreme Court's pronouncement on executive foreign affairs powers quoted above.⁸

Dean Harold Koh's recent contribution to the debate about the foreign policy of the Trump administration sheds further light on the potential constitutional volatility of California's conduct.⁹ Koh notes that California's conduct was consistent with how participants in a transnational legal process would be expected to act and encouraged California and other states to continue to resist the Trump

3. Evan Halper, *A California-led Alliance of Cities and States Vows to Keep the Paris Climate Accord Intact*, L.A. TIMES (June 2, 2017), <http://www.latimes.com/politics/la-na-pol-paris-states-2017062-story.html>.

4. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000).

5. *California and Washington State join Carbon Pledge in Defiance of Trump*, REUTERS (Dec. 12, 2017), <https://www.reuters.com/article/us-climatechange-summit-americas/california-and-washington-state-join-carbon-pledge-in-defiance-of-trump-idUSKBN1E625E>.

6. *Id.*

7. See Tori James, *Brown's Final Budget Emphasizes Signature Efforts*, MML NEWS (June 27, 2018), <https://www.mymotherlode.com/news/local/374471/browns-final-budget-emphasizes-signature-efforts.html> ("The \$1.4 billion Cap and Trade Expenditure Plan within Brown's final budget outlines program expenditures to further reduce carbon pollution and support climate resiliency efforts.").

8. *Crosby*, 530 U.S. at 381.

9. See Harold Hongju Koh, *International Law vs. Donald Trump, A Reply*, OPINIO JURIS (Mar. 5, 2018), <http://opiniojuris.org/2018/03/05/international-law-vs-donald-trump-a-reply/> ("[O]ther American climate actors—states and localities, private companies and NGOs, the bureaucracy—should make clear to the international actors seeking to preserve the Paris accords that Donald Trump does not own the process or speak entirely for America. Norm-internalization goes all the way down.").

administration.¹⁰ Koh first developed the now dominant transnational legal process theory to explain why states obey international law in the absence of a global policeman: domestic governmental actors interact with foreign governments and civil society representatives on a regular basis; this interaction causes each participant to interpret the claims made by the other actors by reference to a shared international legal framework; and this interpretation in turn will lead each side to internalize the respective norm commitments of the other in domestic law without need for a global policeman.¹¹ California's defiance of the Trump administration, according to Koh, is simply an expression of its norm internalization of the claims made by the global community pursuant to the Paris Agreement.¹²

Koh's contribution meaningfully moves the ball. It describes why and how California and other states act in defiance of the President: they act to protect norms they internalized as transnational legal process participants.¹³ This description moves the Californian experience into a broader legal context beyond the current policy battles between majority Democratic states and the Trump administration. In other words, Koh's rubric gives us the opening not to ask the politically loaded question: may California defy the Trump administration? Instead, we can ask: are states constitutionally permitted to participate in transnational legal processes even when such participation has the potential to give rise to state laws defying federal foreign policy?

The answer to this reframed question is far from obvious. The U.S. Supreme Court in *American Insurance Association v. Garamendi* held that "the exercise of the federal executive [foreign affairs] authority means that state law must give way where, as here, there is evidence of clear conflict between the policies adopted by the two."¹⁴ This answer on its face suggests that federal foreign *policy* can always overrule state *law* to the extent that there is "clear conflict between the policies" in question.¹⁵ Such a reading of *Garamendi* would thus shut the door on meaningful state participation in transnational legal

10. *Id.*

11. See Harold H. Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 194–206 (1996) [hereinafter Koh *TLP*] (explaining how the transnational legal process functions).

12. See Harold H. Koh, *International Law vs. Donald Trump, A Reply*, OPINIO JURIS (Mar. 5, 2018), <http://opiniojuris.org/2018/03/05/international-law-vs-donald-trump-a-reply/>.

13. See *id.*

14. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421 (2003).

15. See *id.*

processes without at least tacit federal approval. It also would mean that, transnational legal process or not, state attempts to act as a check on federal foreign policy would be *per se* unconstitutional.

As discussed in Part I, the foreign affairs law literature submits that this conclusion is not warranted upon a review of constitutional jurisprudence as a whole. This literature, led by Jack Goldsmith from the conservative side and Michael Glennon and Robert Sloane from the liberal side, suggests that there is significant room for state action in foreign affairs.¹⁶ These scholars each submit further that Supreme Court jurisprudence is more nuanced than what the traditional sound-bites of Presidential exclusivity over foreign affairs would suggest.¹⁷

As Part I concludes, however, this literature stands on shaky grounds precisely in the extreme scenario of state resistance to a federal foreign policy of *defection* from an existing global consensus and towards greater isolation. Goldsmith's submissions on state powers stand in the context of an avowedly anti-cosmopolitan outlook.¹⁸ Glennon's and Sloane's contribution on state collaboration with foreign counterparties, on the other hand, is professedly globalist.¹⁹ Both lines of thoughts run to their underlying value commitments when addressing the question whether states may act as a globalist champion of last resort to stop federal policies of isolationism. Constitutional discourse would thus again threaten to revert to politics.

As Part II articulates, this problem can be avoided by approaching the question of states' powers through a lens inspired by transnational legal process scholarship. This scholarship is instructive because it provides a more accurate description of state behavior in a globalized world order compared to the pre-globalization lens of "foreign affairs" still dominant in the constitutional literature. Thus, the constitutional literature misses constitutionally critical nuances about the contemporary regulatory interactions between state and municipal actors and their foreign counterparts that are the bread and

16. See Jack Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1623 (1997); MICHAEL J. GLENNON & ROBERT D. SLOANE, *FOREIGN AFFAIRS FEDERALISM, THE MYTH OF NATIONAL EXCLUSIVITY* (2016).

17. See Goldsmith, *supra* note 16, at 1623, 1682; GLENNON & SLOANE, *supra* note 16, at 353.

18. See Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1852 (2009); Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 STAN. L. REV. 1667, 1677–78 (2003).

19. GLENNON & SLOANE, *supra* note 16, at 229.

butter of leading descriptive theories such as transnational legal process and the related global governance network scholarship.

Part II explains that states participate in transnational legal processes when they join global governance networks. Such networks form when state legislators and regulators exchange with foreign counterparts or global civil society actors to discuss joint problems.²⁰ They thus provide fertile ground for transnational legal processes to take hold in state legislatures and government offices.

Part II then explains how state participation in transnational legal processes predictably leads to friction between state and federal actors. Transnational legal process is context dependent: it internalizes norms in light of a specific context for interaction with foreign counterparts or a specific network.²¹ But there are many global governance networks. These networks naturally resist and compete with each other for greater influence over policymaking along predictable lines.²² Knowing the type of actors involved—federal government actors and state actors in a federal system—it is thus possible to map where, when, and how this resistance will occur in light of this competitive dynamic.

Part II contributes to the literature, which currently treats these conflicts indiscriminately pursuant to the traditional monolithic “foreign affairs” rubric, by mapping the underlying conflict potential in five states of resistance, providing practical examples for each. The first state of resistance arises when state laws seek to prevent a federal defection from global governance networks. This is the current California scenario. The second state of resistance arises when state actors participate on one side of an ongoing network conflict between different federal constituencies. For example, a state could pass

20. See ANNE MARIE SLAUGHTER, A NEW WORLD ORDER 38 (2004) (discussing the formation of regulatory networks); Koh *TLP*, *supra* note 11, at 194–206 (explaining how the transnational legal process functions); see also Melissa Waters, *Normativity in the “New” Schools: Assessing the Legitimacy of International Legal Norms Created by Domestic Courts*, 32 YALE J. INT’L L. 455, 456 (2007) (noting the common points between these different schools). For the broader governance literature, see, e.g., EYAL BENVENISTI, THE LAW OF GLOBAL GOVERNANCE *passim* (2014); Harold H. Koh, *Why Transnational Law Matters*, 24 PENN ST. INT’L L. REV. 745, 751 (2006) (linking transnational legal process with global governance); Nico Krisch & Benedict Kingsbury, *Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT’L L. 1, 1 (2006) (“[M]uch of global governance can be understood as regulation and administration, and that we are witnessing the emergence of a ‘global administrative space’”).

21. See Koh *TLP*, *supra* note 11, at 194–206.

22. See Paul B. Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573, 1578–79 (2011).

legislation to bar any affiliate of a company doing business in a country known for its abysmal human rights record from participation in state contracts, in conflict with federal free trade policies. In this context, states act as a catalyst for more definite federal action to resolve the latent federal policy conflict (e.g., the conflict between members of the federal government participating in both human rights and trade networks). The third state of resistance involves the formation of networks from which federal actors are totally absent, such as networks forming between sub-national government units along an international border. In this context, states can meaningfully advance their own traditional interests by exchanging with foreign actors on the most effective means to implement these interests into policy. The fourth state of resistance sees states acting as a drag on federal policy, particularly in areas of traditional state interests such as the prosecution of criminal defendants in state court. The fifth state of resistance, finally, concerns the disagreement between state and federal officials about how far to promote norm internalization in a shared network space such as environmental or health law. Each of these conflicts meaningfully differs from the others. They further showcase that the current defection scenario is but a small piece to a larger constitutional puzzle.

So far, scholarship has not answered the crucial question: what is the *constitutional* significance of state participation in transnational legal processes and global governance networks? Part III proposes that the Compact Clause provides the best constitutional perspective to understand this state participation in, and resistance through, global governance networks.²³ Part III draws an important constitutional distinction between state *coordination* with foreign actors and state *cooperation* with foreign actors. It explains that coordination looks for the immediate achievement by the state of its regulatory goals by participating in a network. Cooperation, on the other hand, involves a bargained-for exchange. Part III submits that under the Compact Clause, states may independently *coordinate* with foreign actors through their participation in global governance networks but must not *cooperate* with them without federal approval. In determining whether states had the requisite authority to coordinate with regard to any specific measure, courts will balance the link of the state measure to traditional police powers against the

23. See U.S. CONST. art. I, § 10, cl. 3.

intrusion of the measure upon traditional federal foreign policy prerogatives.²⁴

Part III advances the literature by showcasing that even cases criticized by most scholars now fit within a broader transnational process paradigm.²⁵ This approach is therefore descriptively more capacious and doctrinally more accurate than the existing contributions because of its more granular transnational legal process lens. Part III also shows how this paradigm can explain why trends of constitutional normalization of foreign affairs law currently coexist with trends of obvious foreign affairs exceptionalism, thus underscoring its descriptive appeal.²⁶

Part IV then sets out to remap the states of resistance developed in Part II over this new rubric. Part IV concludes that state governments may create any of the states of resistance outlined in Part II and thus participate as constitutive actors on the global stage by exercising their state laws or regulations. Part IV also explains that the federal government is not powerless to exact counter-pressure and ultimately preempt such state laws or regulations. Part IV will use the constitutional paradigm developed so far to chart what federal response will suffice to overcome each state of resistance.

Part V will conclude with an appraisal of why state participation in global governance networks is in fact desirable. First, it brings federalist checks and balances to foreign affairs. The Constitution empowers states to act as a meaningful check on the president in foreign affairs. But the Article ultimately concludes that the greatest benefit of state participation is that it acts as a catalyst to apply the transnational legal process to itself in the other conflict scenarios. Transnational legal process can create centrifugal forces by driving policy actors in different administrative departments to enter into their own competing governance networks. State participation forces engagement across these networks in fruitful ways. It thus provides a

24. Part III will also defend the balancing approach against the criticism preemptively raised against such an approach by Glennon and Sloane. See GLENNON & SLOANE, *supra* note 16, at 133–35.

25. See generally *Zschernig v. Miller*, 389 U.S. 429 (1968). For critiques of *Zschernig*, see, e.g., Goldsmith, *supra* note 16, at 1629; GLENNON & SLOANE, *supra* note 16, at 103–21; Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Affairs*, 128 HARV. L. REV. 1897, 1918 (2015).

26. See Sitaraman & Wuerth, *supra* note 25, at 1918; Curtis A. Bradley & Jack Goldsmith, *Presidential Control Over International Law*, 131 HARV. L. REV. 1201, 1263 (2018).

previously un-theorized means to integrate the value commitments propagated in nearly all transnational legal processes with each other.

I. STATES, FOREIGN AFFAIRS, AND THE CONSTITUTION

A. *The Commonplace View: National Exclusivity*

Most lawyers have two preconceptions about the constitutional assignment of foreign affairs powers. First, states have no business participating in foreign affairs.²⁷ Second, the Constitution reserves foreign affairs powers to the President.²⁸ This commonplace understanding finds its doctrinal home in the “dormant foreign affairs clause.”²⁹

The Constitution lends some textual support to the first proposition that the federal government alone holds foreign affairs powers. Article I, section 10 of the Constitution provides that “No State shall enter into any Treaty, Alliance, or Confederation.”³⁰ It continues that states also are prohibited to “grant Letters of Marque and Reprisal.”³¹

Article I, section 10 second addresses the question of import duties—a critical question on the control of foreign trade at the time of the drafting of the constitution.³² Article I, section 10 makes clear that the overall supremacy on questions of import duties lies with Congress and that states may act only with Congressional acquiescence.³³ To remove further temptations of state adventurism, Article I, section 10 provides that “the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use

27. See *Zschernig v. Miller*, 389 U.S. 429, 436 (1968) (“That kind of state involvement in foreign affairs and international relations—matters which the Constitution entrusts solely to the Federal Government—is not sanctioned by *Clark v. Allen*.”); *Holmes v. Jennison*, 39 U.S. 540, 572 (1840) (the Framers “anxiously desired to cut off all connection or communication between a state and a foreign power . . .”).

28. See *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 424 (2003) (the “President [is] to speak for the Nation with one voice in dealing with other governments . . .”).

29. See Garrick Pursley, *Dormancy*, 100 GEO. L.J. 500, 500, 552–61 (2012) (theorizing dormant foreign affairs through the lens of a state preclusion thesis that “[s]tate governments may not take actions that undermine the constitutionally established structure of government of which they are a part.”).

30. U.S. CONST. art. I, § 10, cl. 1.

31. *Id.*

32. See G. Edward White, *The Political Economy of the Original Constitution*, 35 HARV. J.L. & PUB. POL’Y 61, 71–75 (2012) (discussing the political background of the imports and exports duties provision in Article I).

33. U.S. CONST. art. I, § 10, cl. 2.

of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.”³⁴

Article I, section 10 further lays out that states also do not have powers to conduct war, save in extreme cases.³⁵ This reserves again one of the key foreign affairs powers—the power to wage war to vindicate international rights—with the federal government.³⁶

Finally, the Constitution’s Supremacy Clause is explicit that treaty commitments of the United States displace the constitution and laws of the several states.³⁷ It thus again provides support for a broader proposition of federal foreign affairs supremacy over the states.³⁸

The Constitution on its face is less supportive of the second commonplace preconception that the executive is vested with supreme foreign affairs powers.³⁹ It provides in Article II, section 2 only that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls.”⁴⁰ Nevertheless, from at least the 1790s, the initiative in foreign affairs was vested in the Presidency.⁴¹ This initiative was, however, subject to Congressional oversight.⁴²

As recent literature has demonstrated, the commonplace understanding of federal exclusivity in the context of foreign affairs on closer inspection greatly oversimplifies the federalist architecture of the Constitution.⁴³ To begin with, the constitutional text does not

34. *Id.*

35. U.S. CONST. art. I, § 10, cl. 3.

36. See OONA A. HATHAWAY & SCOTT J. SHAPIRO, *HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* 96 (2017) (discussing the role of war in international law at the time of the nation’s founding).

37. U.S. CONST. art. VI, cl. 2.

38. See Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1587 (2003) (“The Supremacy Clause makes clear that treaties can override inconsistent state law . . .”).

39. See Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 707 (2000) (“The conventional view is that deference to the executive branch concerning the meaning of customary international law is covered by essentially the same rule governing treaties: Courts are to give substantial weight to the executive branch’s interpretation so that the United States generally will speak with one voice in foreign affairs.”).

40. U.S. CONST. art. II, § 2, cl. 2.

41. Frederic G. Sourgens, *The Paris Paradigm*, 2019 U. ILL. L. REV. (forthcoming June 2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3125923.

42. See Goldsmith, *supra* note 16, at 1682–83.

43. GLENNON & SLOANE, *supra* note 16, at 353 (arguing that the Constitution “permit[s] states to act unless Congress has clearly prohibited them from doing so”); see Jack Goldsmith,

completely displace state powers to conduct foreign affairs.⁴⁴ It creates a space for coexistence between the states and the federal government. On its face, so long as Congress does not object and so long as it does not conflict with the foreign policy of the United States, there is little that would prevent the states from engaging in foreign policy of their own.⁴⁵ In fact, states are reasonably active in communicating with foreign governments with regard to issues that affect their respective economic interests.⁴⁶ State trade missions abroad to woo investments are one such frequent example.⁴⁷

Further, the impact of state conduct on foreign affairs does not automatically give the federal government a right to preempt the execution of state laws. Thus, the International Court of Justice (ICJ) in several cases held that the murder convictions of defendants in state court violated international law requirements of consular notification.⁴⁸ The International Court of Justice further ordered the United States to halt the executions.⁴⁹

The issue had significant foreign policy implications as the United States had a treaty obligation to comply with the ICJ's decision.⁵⁰ Texas and other states refused to heed the decision by the International Court of Justice or a request by President Bush to halt the execution in question, forcing litigation on the issue of whether

Federal Courts, Foreign Affairs, and Federalism, 83 VA. L. REV. 1617, 1682–83 (1997) (discussing the current view that Congress must act to preempt state conduct internationally).

44. GLENNON & SLOANE, *supra* note 16, at 20 (pointing out that no constitutional provision exists vesting exclusive foreign affairs powers in the federal government).

45. GLENNON & SLOANE, *supra* note 16, at 353 (arguing that the Constitution “permit[s] states to act unless Congress has clearly prohibited them from doing so”); Goldsmith, *supra* note 16, at 1682–83 (discussing the current view that Congress must act to preempt state conduct internationally).

46. See Section II.B.

47. See, e.g., Trade Missions, Cal. Gov. Office of Bus. & Econ. Dev., <http://www.business.ca.gov/Programs/International-Affairs-and-Business-Development/International-Trade-Promotion/Trade-Missions> (last visited June 1, 2018) (summarizing California’s foreign trade missions); Trade Missions, Empire St. Dev., <https://esd.ny.gov/international/trademissions.html> (last visited June 1, 2018) (summarizing New York’s foreign trade missions); Christopher Fryer, *Bevin Takes Kentucky Delegation to Asia for Trade Mission*, LOUISVILLE BUS. FIRST (May 17, 2018), <https://www.bizjournals.com/louisville/news/2018/05/17/bevin-takes-kentucky-delegation-to-asia-for-trade.html> (reporting on recent Kentucky trade mission to Asia).

48. See Bruno Simma & Carsten Hoppe, *From Lagrand and Avena to Medellin – A Rocky Road Towards Implementation*, 14 TUL. J. INT’L & COMP. L. 7 (2005) (discussing the cases in question).

49. See *id.* at 22–26.

50. See *id.*

the executions could proceed.⁵¹ The issue ultimately reached the U.S. Supreme Court in *Medellin v. Texas*; the Court sided with Texas.⁵² The lead complainant in the Supreme Court case, José Medellín, was executed shortly after the decision was rendered.⁵³ Plainly, the invocation of foreign affairs powers by the federal government had little impact even in a case of clear conflict between the federal foreign policy to abide by the ICJ's judgment and state law requiring the execution of the criminal defendant in violation of that judgment.⁵⁴ These gaps in the commonplace understanding of foreign affairs powers showcase that the relationship between the states and the federal government are more nuanced than might at first appear.

B. *The Current Paradigm: Co-operation and National Supremacy*

1. Rebuffing Dormant Foreign Affairs Preemption

Jack Goldsmith's 1997 article *Federal Courts, Foreign Affairs and Federalism* revolutionized the current debate on the role of states in foreign affairs and began to point out the gaps in the commonplace understanding outlined above.⁵⁵ Goldsmith's core submission is that globalization has washed away the distinction between "traditional areas" of foreign relations and more traditional areas of domestic policy.⁵⁶ This shift, in turn, necessitates a reappraisal of classical foreign relations jurisprudence appearing to prohibit state action in foreign affairs reached against this more traditional background condition.⁵⁷ This new state of affairs could certainly lead to conflict between the states and the federal government on questions that

51. See *id.* at 26–56 (discussing the various leading decisions prior to the *Medellin* U.S. Supreme Court decision).

52. See *Medellin v. Texas*, 552 U.S. 491, 525–32 (2008) (holding that the treaty obligations would only preempt state convictions if the treaties in question were self-executing and holding that they were not).

53. Allan Turner, *Medellin Executed for Rape, Murder of Houston Teens*, HOUS. CHRON. (Aug. 5, 2008), <https://www.chron.com/news/houston-texas/article/Medellin-executed-for-rape-murder-of-Houston-1770696.php>.

54. For a discussion of *Medellin*, see, e.g., Bradley & Goldsmith, *supra* note 26, at 1263 (2018); GLENNON & SLOANE, *supra* note 16, at 239–43; Oona A. Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 51, 70–76 (2012).

55. See Goldsmith, *supra* note 16, at 1671. For the continued relevance of Goldsmith's article and discussions agreeing with its principal points, see, e.g., GLENNON & SLOANE, *supra* note 16, at 353; Sirataman & Wuerth, *supra* note 25, at 1918; Edward L. Rubin, *The Role of Federalism in International Law*, 40 B.C. INT'L & COMP. L. REV. 195, 198 (2017).

56. Goldsmith, *supra* note 16, at 1671.

57. See *id.* (globalization "reflect[s] a significant increase in international cooperation, coordination, and regulation that has blurred the distinction between foreign and domestic relations along several axes. ").

involve foreign relations. But Goldsmith's overarching assertion is that:

[t]he presence of such externalities does not, by itself, justify federal judicial lawmaking. In the absence of a serious breakdown in the political process, our constitutional democracy normally depends on the elected federal political branches to correct this sort of problem. Political instead of judicial federalization is especially warranted here since the values to be attached to the competing federalism and foreign relations interests appear increasingly contested.⁵⁸

Goldsmith argues that Congress retains the ability to preempt state law directly, should it wish to do so.⁵⁹ Noting that Congress lacks the institutional capability to address many foreign affairs matters promptly, Goldsmith further submits that the executive can act within its own foreign affairs powers or delegated powers to preempt state law when it deems that this is necessary.⁶⁰

Goldsmith's argument is deeply critical of Supreme Court decisions that purported to carve out broad foreign affairs powers exclusively for the federal government. The principal such case is the 1968 decision in *Zschernig v. Miller*.⁶¹ In *Zschernig*, the Supreme Court invalidated an Oregon inheritance law requiring that foreign nationals could inherit property from an Oregon estate only to the extent that the foreign national's home law would guarantee that the national would have a right to hold that property.⁶² The law was implicitly anti-communist, as it required foreign jurisdictions to recognize a right to private property for their nationals to qualify as heirs in Oregon.⁶³ The Court ruled that the law unduly impinged on federal foreign affairs powers.⁶⁴

58. *Id.* at 1679.

59. *Id.* at 1681–83.

60. *See id.* at 1684 (“When the executive branch identifies harmful state foreign relations activity, it is much better positioned than Congress to address it. Foreign relations is (and is perceived to be) the President’s responsibility. He is thus more accountable for foreign relations problems than Congress, and has a greater interest in redressing state-created foreign relations difficulties.”).

61. *Zschernig v. Miller*, 389 U.S. 429 (1968).

62. *Id.* at 440.

63. *Id.*

64. *Id.* at 441 (“The Oregon law does, indeed, illustrate the dangers which are involved if each State, speaking through its probate courts, is permitted to establish its own foreign policy.”).

For Goldsmith, the *Zschernig* Court sought to resolve a problem that did not exist.⁶⁵ The federal executive had submitted an amicus brief in which it confirmed that the Oregon law had not “unduly interfered” with federal foreign policy interests.⁶⁶ Congress had not acted to preempt the law, nor was there a treaty in place that would have impeded the law’s application.⁶⁷ The decision thus epitomized judicial overreach in arrogating to the courts the power to conduct an “independent assessment of the foreign relations consequences of applying state law.”⁶⁸ And it did so without textual, historical, or functional support.⁶⁹

Goldsmith’s inversion of our commonplace understanding—and of *Zschernig*—has become the new normal. In one of the seminal studies on state foreign affairs powers, Glennon and Sloane conclude that courts should “except in extraordinary circumstances, permit the states to act unless Congress has clearly prohibited them from doing so.”⁷⁰ Glennon and Sloane follow closely along a similar logical path to Goldsmith in criticizing dormant foreign affairs preemption.⁷¹ Others have argued along similar lines that there is simply no textual or functional basis to continue to imply a dormant foreign affairs power in the federal government.⁷²

2. Limiting Dormant Foreign Commerce Preemption

Glennon and Sloane in particular pushed back further against another kind of dormancy doctrine with relevance to foreign affairs: the dormant foreign commerce clause. The dormant foreign commerce doctrine arises out of the commerce clause in Article I, section 8, clause 3 of the Constitution, which provides that Congress

65. See Goldsmith, *supra* note 16, at 1629.

66. *Id.*

67. *Id.*

68. *Id.*

69. See *id.* at 1698 (“Many of the just-identified problems of a federal common law of foreign relations—disincentives for political branch action in this context, decentralization of the federal foreign relations lawmaking process, and nonuniformity of federal foreign relations law—are thus not present in a world governed by state law in the absence of a controlling federal enactment.”).

70. GLENNON & SLOANE, *supra* note 16, at 353.

71. *Id.* at 129–45.

72. See, e.g., David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 967 (2014) (noting the jurisprudential shift away from *Zschernig* preemption); Sitaraman & Wuerth, *supra* note 25, at 1979 (“In the decades since the end of the Cold War, however, the Court has said a great deal about foreign affairs. Perhaps surprisingly, most of what it has said is that foreign relations law is not so exceptional after all. Scholars too have come to the same conclusion.”).

shall have the power to “regulate Commerce with foreign Nations, and among the several States.”⁷³ The dormant foreign commerce clause has the potential effect to create a new dormant foreign affairs clause because “cars, locomotives, refrigerators, clocks, pens, aircraft engines, and so—all go through a serpentine international odyssey.”⁷⁴ Exclusive authority to regulate such broad global commerce would come to the same result as the authority to regulate all of foreign affairs.

Glennon and Sloane push back against such an expansive reading of the dormant foreign commerce clause. They note the clause’s close textual relation to the interstate commerce clause. They conclude that structurally and functionally, there is nothing inherently different about global trade compared to interstate trade and that the same two-factor test governing the dormant interstate-commerce clause should also govern the dormant foreign commerce clause: first, discrimination against interstate state commerce is per se invalid; second, nondiscriminatory regulations are invalid if “the burden imposed on commerce is clearly excessive in relation to local benefits.”⁷⁵ This limitation significantly restricts any dormant foreign affairs preemptive effect of the clause.

3. Remaining Disagreement: State Autonomy vs. Global Cooperation

The literature on its face agrees in its rejection of broad dormant foreign affairs or broad dormant foreign commerce clause preemption, thus carving out an apparent consensus on the permissibility of state action in foreign affairs. This facial agreement is, however, potentially misleading. Scholars such as Goldsmith on the one end and Glennon and Sloane on the other end may well agree that states have a broader freedom from federal constraint. But their normative starting points are meaningfully different in ways that have profound practical implications.

Thus, much of what animates Goldsmith in rejecting broad “common law” doctrines preempting state conduct affecting foreign affairs is a concern for democratic *autonomy*.⁷⁶ Goldsmith’s distrust of

73. U.S. CONST. art. I, § 8, cl. 3.

74. GLENNON & SLOANE, *supra* note 16, at 149.

75. *Id.* at 171, 178. The only additional factors jurisprudence has recognized beyond these two classic interstate tests concern tax measures. *Id.* at 171.

76. Goldsmith, *supra* note 16, at 1631 (discussing the concept of judge-made foreign

this “common law of foreign affairs” is that it is not checked by democratic political processes.⁷⁷ These democratic political processes, he notes, in turn do suffice to check aberrant state behavior that truly interferes with federal foreign policy.⁷⁸

Goldsmith’s scholarship and the work of other like-minded scholars places this autonomy in juxtaposition to broader cooperative international norms.⁷⁹ In the first instance, Goldsmith’s project of critiquing a foreign affairs “common law” not only wishes to create broader leeway for action for the states.⁸⁰ It is married with a related project to attack the inclusion of the world’s common law—that is, customary international law—in federal common law, as well.⁸¹

Both attacks, the attack on federal foreign affairs “common law” and the attack on the inclusion of customary international law in federal common law, are motivated by the value of democratic

relations common law); Goldsmith & Levinson, *supra* note 18, at 1852 (“One important reason why democratic states do not engage in more cosmopolitan action is because the citizens and elected officials in those states do not support it. This is not just a practical constraint on the realization of moral good but also, for many, a competing moral imperative, grounded in the moral claims of democratic self-government.”).

77. Goldsmith, *supra* note 16, at 1623 (“The federal political branches are much better at redressing state intrusions on federal foreign relations prerogatives, and the federal courts much worse, than is commonly thought. Thus, there is little need for a federal common law of foreign relations, and good reason to believe that federal courts do not develop this law in a fashion that achieves its stated goals.”); *id.* at 1668 (“But even if they had access to the information possessed by the political branches and even if foreign relations training were a prerequisite to judicial service, they still would not be well-suited to make such determinations. Judges lack national political accountability.”).

78. *Id.* at 1623.

79. See Goldsmith & Levinson, *supra* note 18, at 1852 (“In moral theory and international law alike, there is no easy escape from the challenge of reconciling normative constraints and demands on the state with the traditional claims of state sovereignty and self-determination.”).

80. See Goldsmith, *supra* note 16, at 1681–83.

81. See Curtis Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 861–62 (1997) (linking the rejection of customary international law as federal common law directly to federalism concerns); Jack L. Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 708 (1998) (“*Erie*’s constitutional holding says that state or federal law must supply the authorization for federal courts to apply customary international law.”); Jack L. Goldsmith & Curtis Bradley, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260, 2264 (1998) (noting that the customary international law applied by federal courts following *Filartiga* “differed in crucial respects from the CIL applied in the nineteenth and early twentieth centuries” by including human rights norms inconsistent with *Erie*); Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance between Modern and Traditional Customary International Law*, 40 VA. J. INT’L L. 639, 672 (2000) (“Modern CIL is mostly aspirational, just as old CIL was. With old and new CIL alike, nations mouth their agreement to popular ideals as long as there is no cost in doing so, but abandon their commitments as soon as there is a pressing military or economic or domestic reason to do so.”).

political accountability—or “democratic self-determination.”⁸² When federal courts act to preempt state conduct on the grounds of foreign affairs “common law” doctrines, unelected judges override the promulgation of elected state executives and legislatures.⁸³ When federal courts rule on the basis of customary international law, they impose norms on the nation that are not derived from any national popular will but rather emanate from an amorphous world community without any legislative imprimatur.⁸⁴

The point of this line of scholarship therefore is to provide freedom for the states to act autonomously to represent the distinct wishes of their constituencies. It rejects foreign affairs exceptionalism—the notion that foreign affairs are a special sphere of extra-constitutional federal power—in favor of a form of American exceptionalism.⁸⁵

Glennon and Sloane, on the other hand, are concerned with increasing global cooperation.⁸⁶ In rejecting federal preemption, they wish to make space for collaborative, cosmopolitan efforts by states and civil society at large.⁸⁷ They see states as a key actor in regulating globalization. But, unlike Goldsmith, they embrace the globalization premise that greater social and economic interconnection can only be guided and tamed by greater legal interconnection.⁸⁸

When placed in the broader framework of Sloane’s scholarship, and the frame of his jurisprudential outlook, state participation in foreign affairs captures important social policy processes.⁸⁹ This project begins from the assumption that there exists a normatively

82. Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1845 (2009) (“If classical state sovereignty is on its way to obsolescence, democratic self-determination stands ready to take its place.”).

83. See Goldsmith, *supra* note 16, at 1668.

84. See Goldsmith, *supra* note 16, at 1712–13; Bradley & Goldsmith, *supra* note 81.

85. See Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 STAN. L. REV. 1667, 1677–78 (2003) (noting that cosmopolitan actions by the United States are obviated by democratic constraints).

86. GLENNON & SLOANE, *supra* note 16, at 38–39 (noting state action in the face of federal paralysis through cooperation on standards and best practices).

87. *Id.* at 299 (“[L]ocal actors at the state and municipal levels took the initiative to advance values (e.g., political reform in Burma, international human rights protection) that might otherwise have been marginalized.”).

88. Compare *id.* (outlining cosmopolitan value of state action) with Goldsmith, *supra* note 85, at 1677–78 (noting that cosmopolitan actions by the United States are obviated by democratic constraints).

89. See Robert D. Sloane, *More Than What Courts Do: Jurisprudence, Decision, and Dignity – In Brief Encounters in Global Affairs*, 34 YALE J. INT’L L. 517, 522 (2009) (discussing the importance of diverse constitutive actors in legal processes).

(and legally) relevant world society and that domestic legal processes simply reflect and participate in these global legal processes.⁹⁰ It thus rejects as jejune the notion that Rousseauian communal sovereignty somehow suffices to isolate any one society from the world “out there.”⁹¹

This scholarship’s goal is in many ways the opposite of Goldsmith’s. It wants to increase the autonomy of states by permitting them to cooperate more fully with the world community.⁹² The distinct wishes of constituencies are meaningful because they engage with and participate in world social process beyond their own town and state limits.⁹³ It rejects foreign affairs exceptionalism *and* American exceptionalism in order to preserve American leadership in tackling pressing world problems.⁹⁴

This difference in normative outlook has important practical consequences. Most starkly, and as is most immediately intuitive, both lines of scholarship disagree with each other on whether customary international law preempts contrary state law. Customary international law still provides a good part of the scaffolding for international legal cooperation to take place.⁹⁵ Consequently, Glennon and Sloane as a matter of outlook reject the hypothesis that violations of customary international law should be permissible—and provide a well-founded historical analysis to support their point of view that customary international law (the law of nations) was always intended to be part of the Supremacy Clause as federal common law.⁹⁶ The Goldsmithian line of scholarship, as discussed above, rejects this submission on *Erie* and implicit state sovereignty grounds.⁹⁷

90. GLENNON & SLOANE, *supra* note 16, at 38 (“[S]ocial and economic problems can be addressed effectively only through cross-border collaboration – necessitating cooperative arrangements between states and foreign states.”).

91. *Compare id.* at 9 (“[T]his vision of republicanism, however, as Rousseau’s Social Contract made clear, could not work in the absence of a relatively homogenous small polity. For civic virtue to flourish in any polity, citizens must share common values and interests and their personal desires must remain consistent with the general will.”) *with* Goldsmith, *supra* note 85, at 1677–78 (2003) (noting that cosmopolitan actions by the United States are obviated by democratic constraints).

92. GLENNON & SLOANE, *supra* note 16, at 38.

93. *Id.*

94. *Id.* at 299.

95. See Laurence R. Helfer & Ingrid B. Wuerth, *Customary International Law: An Instrument Choice Perspective*, 37 MICH. J. INT’L L. 563, 609 (2016) (arguing that states will continue to choose customary international law despite the rise in codified legal instruments and soft law).

96. GLENNON & SLOANE, *supra* note 16, at 253–72.

97. See sources cited *supra* note 81.

This difference in normative outlook also matters in the context of traditional states' rights discourses. The Goldsmithian line of argument finds a natural jurisprudential ally in "states' rights" —and traditional areas of state competence. These doctrines have been used as a rhetorical and legal bulwark in a context that rarely connoted greater national or global inclusion or cooperation.⁹⁸ To the contrary, they have been used to defend local prescriptions against the external on a normative foundation that is premised precisely upon the superior normative force of the local, Rousseauian community.⁹⁹ This states' rights outlook allows Goldsmith to defend decisions such as *Medellin*, which refused to apply international legal obligations on the states even when the United States had, through its political process, ratified core treaties at stake in the dispute (the U.N. Charter and the Vienna Convention on the Consular Relations) on the ground that these treaties were not self-executing.¹⁰⁰

Glennon and Sloane's global outlook instead responds to *Medellin* by noting that it is a "recent concrete example of state or local foreign-policy initiatives that have clearly and significantly damaged the nation as a whole."¹⁰¹ It bristles at the notion of using traditional state areas of competence as a test to limit the foreign affairs powers of the federal government.¹⁰² States' rights and states' powers, in other words, are a political lightning rod separating both schools of thought,

98. See Jane Dailey, *Race, Marriage, and Sovereignty in the New World Order*, 10 THEORETICAL INQUIRIES L. 511, 533 (2009) ("[B]y 1950 . . . the argument that international human rights norms might trump discriminatory local practices had outpaced the domestic political will to support those rights and had, instead, inspired strenuous resistance—as demonstrated by the Bricker Amendment and a mounting rhetoric of local sovereignty/'states's rights'."); see also Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 354 (2008) (noting the traditionally conservative rhetoric of judicial restraint, originalism, and states' rights).

99. See H. Jefferson Powell, *Joseph Story's Commentaries on the Constitution: A Belated Review*, 94 YALE L.J. 1285, 1303 (1985) (noting the historical precedent that "states' rights theorists attempted to avoid the anti-majoritarian implications of their stand by contending that the relevant majority was the majority within each individual state; they supported this assertion with the claim that the states as bodies politic had preceded and created the Union.").

100. See Bradley & Goldsmith, *supra* note 26, at 1263 (describing the *Medellin* Court's rejection of an executive branch effort to preempt state law); see also *Medellin v. Texas*, 552 U.S. 491, 511, 514 (2008). For an interesting discussion linking *Medellin* to the current immigration federalism debate, see David S. Rubenstein, *Black-Box Immigration Federalism*, 114 MICH. L. REV. 983, 996 (2016).

101. GLENNON & SLOANE, *supra* note 16, at 142–44.

102. *Id.*

despite their facial agreement on the broader role of states in foreign affairs.¹⁰³

C. *The Conflict Problem: American Insurance Association v. Garamendi*

The ideological disagreement between the Goldsmithian and Glennon-Sloane conceptions of state participation in foreign affairs comes to a head when there are instances of outright conflict between the federal government and the state governments on questions of foreign policy. Again, both conceptions would carefully seek to avoid conflict by parsing disagreements as permitting states to continue to have a seat at the table because federal policy has not been sufficiently clearly articulated—or not articulated by the right actor. But both conceptions would part ways when this avoidance is no longer possible because there is a bona fide conflict between state and federal foreign policy prerogatives. That scenario would force the values motivating their respective positions to come to the fore.

The U.S. Supreme Court first teed up this problem in *American Insurance Association v. Garamendi*¹⁰⁴ in 2003. *Garamendi* involved Californian legislation requiring insurance companies doing business in California to disclose all policies sold to persons in Europe between 1920 and 1945, as well as the status of those policies, to assist California residents to collect on Holocaust-era claims.¹⁰⁵ The potential for conflict arose because the federal executive had entered into an executive agreement, the German Foundation Agreement, to set up a process for the resolution of claims arising against German nationals from the National Socialist era.¹⁰⁶ The executive agreement provided that the parties wished to create an exclusive forum and that the federal government would appear in court proceedings involving claims covered by the German Foundation Agreement to submit that:

103. At the same time, however, there are other contexts in which even Glennon and Sloane look to traditional state competencies as a source of power, namely in the context of permissible cooperation by states through foreign state compacts. *Id.* at 289 (“[A] focus on traditional state functions may well hold out the promise of a more coherent legal standard for assessing Compact Clause issues in the domain of foreign affairs.”). In other words, Glennon and Sloane wish to preserve states’ rights to cooperate without necessarily advocating for state rights, *tout court*.

104. 539 U.S. 396 (2003).

105. See *id.* at 409 (describing the nature of the California legislation); *id.* at 402.

106. See *id.* at 405 (describing the executive agreement).

the President of the United States has concluded that it would be in the foreign policy interests of the United States for the [German] Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II.¹⁰⁷

As Justice Ginsburg observed in her dissenting opinion, however, the German Foundation Agreement was careful to point out that “[t]he United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal.”¹⁰⁸ The Supreme Court nevertheless struck down the California law because of a conflict between federal foreign policy (rather than federal law) and California state law.¹⁰⁹

In the first instance, the Glennon-Sloane view on its face seeks to show that this was not an instance of conflict between federal policy and state law.¹¹⁰ The federal government took pains to avoid such a conflict.¹¹¹ The judiciary therefore should not have created one where the political branches carefully sought to circumnavigate it.¹¹² This argument is reminiscent of Goldsmith’s critique of *Zschernig*, authored before *Garamendi* was decided.¹¹³

A more careful analysis, however, begins to show cracks in this avoidance strategy. Thus, Glennon and Sloane point out that federal policy should not preempt state law because policy is not law.¹¹⁴ This betrays a cooperative bent: federal policy would only ever ripen into law (treaty, sole executive agreement, congressional executive agreement, etc.) if the federal government sought to cooperate with another foreign counterparty.¹¹⁵

107. Agreement Concerning the Foundation “Remembrance, Responsibility, and the Future”, U.S.-Ger., July 17, 2000, 39 I.L.M. 1298, 1303.

108. 539 U.S. at 436 (Ginsburg, J., dissenting) (quoting *id.* at 1304).

109. See *id.* at 429 (holding that even though Congress had not acted, the President had independent authority in foreign policy and California’s efforts impeded federal policy).

110. GLENNON & SLOANE, *supra* note 16, at 128.

111. *Id.*

112. *Id.*

113. Goldsmith, *supra* note 16, at 1629.

114. GLENNON & SLOANE, *supra* note 16, at 137.

115. See *id.* at 136 (“[T]he federal government has the constitutional power to preempt state law affirmatively under the Supremacy Clause; if it exercises that power, then, even if the state measures taken to advance the shared foreign policy goal prove far more effective than federal measures, state law must give way.”).

The *exit* from treaties, sole executive agreements, or congressional executive agreements is a federal policy that does not make law.¹¹⁶ It is a policy that on its face *removes* federal law.¹¹⁷ The complaint that such policy should not be allowed to preempt state law purely because it is policy rather than law rings hollow. It begs the question whether the policy of *withdrawal of law* (and thus withdrawal of regulation) should be given force and, if so, what force. *Garamendi* would suggest that it should receive some force.¹¹⁸ Glennon and Sloane, predictably given their value commitments to cooperation, disagree.¹¹⁹

The issue does not become easier from the Goldsmithian perspective. The removal of federal law on its face should remove obstacles for state action.¹²⁰ But what if the state action in question seeks to recreate the cooperative structures from which the federal government sought to withdraw? And, what is more, what if the state doing so has sufficient economic clout to drive or, at the very least, to influence the national market? In that instance, should the absence of federal law mean that states should not be allowed to step into the void to cooperate in the federal government's stead? The value commitments of the Goldsmithian perspective would certainly suggest as much. In fact, Goldsmith has argued *against* more global cooperation without clearer Congressional approval, submitting instead that such cooperative opportunities should be delegated to the states.¹²¹

This value commitment thus easily could make use of legal strategies that require Congressional approval for any cooperation,

116. See Kristen E. Eichensehr, *Treaty Termination and the Separation of Powers*, 53 VA. J. INT'L L. 247, 267 (2013) (discussing treaty termination in the context of the Supremacy Clause).

117. See Harold Hongju Koh, *Presidential Power to Terminate International Agreements*, 128 YALE L.J. FORUM 432, 454 (2018) ("U.S. withdrawal from a long-standing treaty or international organization . . . should not become effective without congressional involvement. Such a withdrawal or termination would similarly necessitate unwinding many domestic law statutes that the executive could not repeal alone.")

118. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 423–24 (2003) (discussing the broad discretion that the President has in furthering national policy through economic pressure).

119. GLENNON & SLOANE, *supra* note 16, at 136.

120. Goldsmith, *supra* note 16, at 1664–65 (arguing that in the absence of federal law, state law should control).

121. See Bradley & Goldsmith, *supra* note 26, at 1254 ("Presidential termination or disavowal of international obligations might also negatively impact states. For example, the Trump Administration's effort to pull back from commitments made by the Obama Administration to address climate change could have long-term economic and other effects on U.S. states, especially along the coastlines.").

including state cooperation, through the Compact Clause. The Compact Clause, discussed in detail below, provides that no state shall “without the Consent of Congress . . . enter into any Agreement or Compact with another State, or foreign Power.”¹²²

In a recent article, David Sloss has cautiously noted the potential for such an approach to foreign state compacts.¹²³ Sloss’s article focused on an agreement between California and Quebec providing for a joint cap and trade emissions regime to combat climate change.¹²⁴ Sloss follows in broad outline the analysis of scholars like Glennon and Sloane in that he, too, deems that most such agreements do not require explicit Congressional authorization.¹²⁵

But Sloss focuses upon a prong in interstate compact clause litigation that did not receive similar attention from more cooperation-minded scholars: can the state withdraw from an arrangement at its discretion?¹²⁶ Noting the importance of withdrawal rights in the interstate compact context, Sloss submits that foreign state agreements that do not provide for similar means of discretionary exit would require Congressional approval¹²⁷—essentially because such prospective promises not to withdraw are beyond the power of the state to make in its ordinary legislative process. Because California bound itself not to withdraw at will, Sloss concludes that the agreement with Quebec might well violate the Compact Clause absent Congressional approval.¹²⁸

This argument, in other words, may allow a doctrinal exit for scholars with strong anti-cosmopolitan value commitments to escape from their broader commitment to increased state participation in foreign affairs when federal policy has been to withdraw from international agreements and cooperative structures. Rather than

122. U.S. CONST. art. I, § 10, cl. 3.

123. See generally David Sloss, *California’s Climate Diplomacy and Dormant Preemption*, 56 WASHBURN L.J. 507 (2017). Sloss did not endorse the position fully as his own but noted it as significant doctrinal problem.

124. See *id.* at 508 (describing the agreement between California and Quebec).

125. *Id.* at 521–22 (arguing that the agreement between California and Quebec does not violate the Compact Clause, even without Congressional approval).

126. See *id.* at 524–26 (explaining the requirement that a state have unilateral power to withdraw from agreement to avoid triggering the Compact Clause).

127. *Id.* at 524–25.

128. *Id.* (“If California does not obtain congressional consent for the [agreement with Quebec], a court might hold that the Agreement violates the Compact Clause.”).

embrace state action, this strategy would vindicate the value of Congress as ultimate guardian of democratic self-determination.¹²⁹

D. *Reframing the Garamendi Discussion*

The above discussion has shown that the literature's openness to greater state participation in foreign affairs hits an impasse precisely in the current confrontation between the Trump administration and states like California over the Paris Agreement on climate change.¹³⁰ It thus cannot so far resolve the potential inconsistency between *Garamendi* and Dean Koh's analysis that California's actions were a direct result of its participation in the transnational legal process. Koh submits that "states and localities . . . should make clear to the international actors seeking to preserve the Paris accords that Donald Trump does not own the process or speak entirely for America."¹³¹ *Garamendi* cautions that "[t]he exercise of the federal executive authority means that state law must give way where, as here, there is evidence of clear conflict between the policies adopted by the two."¹³² As discussed in the previous section, the literature so far has not found a coherent answer as to how far or on what basis states could actively resist the express foreign policy of retreat from international commitments, ostensibly creating policy space for state action, as opposed to the affirmative conclusion of international treaties or executive agreements narrowing this space, as was the case in *Garamendi*.¹³³

Helpfully, Koh's call to action rests upon a conceptual framework that can assist in reframing this conflict problem encountered in the foreign affairs literature.¹³⁴ Koh's appeal relies upon an extension of his transnational legal process theory. Transnational legal process theory submits that states comply with international legal obligations and act cooperatively on the international stage because they internalize norms.¹³⁵ This internalization occurs after a three-step

129. See Bradley & Goldsmith, *supra* note 26, at 1254 (explaining that Congress' Article I powers allow it to override presidential actions).

130. See Popovich, *supra* note 2. (describing the conflict between California and the Trump administration).

131. Koh, *supra* note 9.

132. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421 (2003).

133. *Id.* at 416 ("Generally, then, valid executive agreements are fit to preempt state law, just as treaties are.").

134. See generally Koh, *supra* note 9.

135. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2602 (1996) (positing that global norms are ultimately internalized by domestic legal

process. First, participants in a process must interact with each other.¹³⁶ Second, they interpret the statements made by other process participants with whom they interact in light of their own frame of reference.¹³⁷ Third, they internalize the commitments of other process participants in light of their own interpretive framework.¹³⁸

In simple terms, transnational legal process works like our proverbial “common sense.” Routine observation of any daily scene will confirm that human beings are not born with common sense. Rather, they learn it through observation and engagement (and some trial and error). When one has learned a “common-sense rule” (say, “don’t drive drunk! You will get in an accident!”), one follows this rule because one agrees with it and has made it part and parcel of one’s own normative expectations how people should conduct themselves in the world. We no longer follow the rule “don’t drive drunk” because our mother told us not to do it. We follow it because we firmly believe it to be in our own best interest to follow the rule.

Dean Koh’s point about state action in defiance of President Trump’s exit from the Paris Agreement is that “[n]orm-internalization goes all the way down.”¹³⁹ Not only does the federal bureaucracy, starting with the state department and going through to every other leading federal department, internalize international legal norms.¹⁴⁰ Other actors, too, are exposed to the transnational legal process through their participation in global governance networks, discussed more fully in the next section.¹⁴¹ These actors relevantly include state actors.¹⁴²

Because of their participation in global governance networks, and their interaction with foreign governments, these state actors have come to internalize international norms and want to comply with

systems).

136. *See id.* at 2618 (through an interactive process, “law helps translate claims of legal authority into national behavior.”).

137. *See id.* at 2634 (arguing that in order to understand why nations obey international law, one must account for the importance of the interpretation of legal norms).

138. *See id.* (contending that in order to understand why nations obey international law, one must account for the importance of domestic internalization of international norms).

139. Koh, *supra* note 9.

140. *See id.* (asserting that government actors have been forced to internalize international legal norms).

141. *See id.* (discussing the fact that actors outside of the federal government internalize international legal norms).

142. *See id.* (including states as actors outside of the federal government that internalize international legal norms).

these norms.¹⁴³ And they will want to comply with an international norm precisely when they see that the federal government is acting in violation of what they consider to be a common-sense way to conduct oneself in the world. In our common-sense example, the need to act is particularly great when one is in a car with a driver whom one discovers to be drunk only after merging (or swerving) onto a busy highway; in that scenario, one might go to great lengths to make sure that the driver pulls the car over to the side of the highway and gets away from the steering wheel.

Transnational legal process thus inherently creates a potential for conflict between the state and federal governments. It creates the kinds of incentives for state actors to want to act when, to their minds, the federal government is violating basic international norms that they have since internalized as basic common sense.¹⁴⁴

Koh's theory, as well as his call to action, thus conceives of states as an active check on federal foreign policy. This theory—and call to action—thus sits precisely in the most controversial zone of the foreign affairs powers after *Garamendi*.¹⁴⁵ And it sits in a zone that is not yet fully theorized in the literature.¹⁴⁶

But it also provides a starting point for resolving this controversy. The potential for conflict arises because of state participation in global governance networks in which states interact with the transnational legal process. Logically, the conflict is but a symptom of this participation. Thus, if state participation in global governance networks is permissible, the result of this participation by logical extension is also presumptively constitutionally permissible. This frame thus moves from an analysis of symptoms (conflict between state law and federal foreign policy) to causes and can therefore help to resolve precisely the questions posed by the literature—and resolve them in a manner that is reasonably detached from specific policy results, making continued agreement between scholars from different ends of the political spectrum more probable and the resulting proposal more doctrinally sound in the process. The remainder of the

143. See *id.* (pointing out that many states and their citizens want to comply with the Paris Climate Accords).

144. See *id.* (describing the fact that citizens of states may understand the effects of climate change even though the federal government is not complying with the related international norms).

145. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421 (2003) (holding that the exercise of federal executive authority requires state law to give way when there is conflict).

146. See Section I.C.

Article will therefore focus on the question through this reframed perspective.

II. THE REACH OF GLOBAL GOVERNANCE NETWORKS “ALL THE WAY DOWN”

A. *Transnational Legal Process and Global Governance Networks*

The question presented by Dean Koh’s paradigm shift away from classic foreign affairs rubrics towards transnational legal process is whether states may constitutionally participate in transnational legal processes. This section outlines that states participate in transnational legal processes by joining global governance networks. It first introduces the concept of global governance networks and then explains the relationship between global governance networks and transnational legal process.

1. Global Governance Networks

Professor Anne-Marie Slaughter has exhaustively theorized how global governance networks function.¹⁴⁷ Slaughter submits that networks exist on a sliding scale from purely informal, *ad hoc* networks at one end to networks formalized through the creation of international organizations, setting out their functioning in multilateral treaties, on the other.¹⁴⁸ Informal networks form when regulators (or other key actors in civil society) meet and discuss common problems on a reasonably frequent basis—for instance, in the setting of international conferences.¹⁴⁹ The regulators then have a forum to exchange know-how and can then develop stable conduits to improve their own respective regulatory responses to shared

147. SLAUGHTER, *supra* note 20, *passim*; see also Anne-Marie Slaughter, *America's Edge: Power in the Networked Century*, 88 FOREIGN AFF. 94 (2009) (providing a foreign affairs perspective); Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic*, in NEW PERSPECTIVES ON THE DIVIDE BETWEEN INTERNATIONAL AND NATIONAL LAW 110, 117 (Janne Nijman & Andre Nollkaemper eds., 2007) (explaining that a “critically important tool in strengthening the institutions of national governments is the formalization and inclusion of ‘government networks’ as mechanisms of global governance.”); Anne-Marie Slaughter & David Zaring, *Networking Goes International: An Update*, 2 ANN. REV. L. & SOC. SCI. 211, 219 (2006) (discussing the effectiveness of government networks); Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT’L L. 1041, 1042 (2003) [hereinafter Slaughter, *Disaggregated Democracy*] (discussing the relationship between networks).

148. See SLAUGHTER, *supra* note 20, at 48–49 (contrasting these two types of networks).

149. *Id.* at 49.

problems.¹⁵⁰ Formal networks, on the other hand, require diplomatic negotiations involving multiple governmental departments to draft and conclude multilateral treaties setting up standing administrative bodies to coordinate the trans-boundary regulatory exchanges between state members.¹⁵¹

Global governance networks differ from traditional forms of international multilateral lawmaking. Traditional international law making relied upon diplomatic conferences.¹⁵² States participating in diplomatic conferences set out to negotiate *ex ante* the substance and process to be included in a multilateral treaty in a manner akin to contractual bargaining.¹⁵³ States habitually relied upon their own batteries of technical and legal experts to inform their diplomatic negotiation positions.¹⁵⁴ A diplomatic conference was successful if it led to the conclusion of a multilateral instrument, the rules of which would then apply prospectively, leaving only interpretive questions to be resolved during the implementation of the treaty.¹⁵⁵

Global governance networks replace this *ex ante* pre-commitment device of *ex ante* multilateral treaties with regular engagement between technical and legal experts in different jurisdictions sharing a common problem. The goal of global governance networks is to discuss and coordinate solutions to shared problems.¹⁵⁶ To participate in the network in good faith, network participants must accept that they share a common problem.¹⁵⁷ Their discourse is fruitful if they can assess the regulatory experience of their peers and engage in critical conversations about possible pathways to resolve their common problem.¹⁵⁸ Their discourse may at some point create the shared need

150. *Id.*

151. *See id.* at 63–64 (comparing regulators to the diplomats of old).

152. *See* Timothy Meyer, *From Contract to Legislation: The Logic of Modern Lawmaking*, 14 CHI. J. INT'L L. 559, 569 (2014) (contrasting the traditional role of a diplomatic conference to bilateral prescriptive approaches).

153. *See id.* (comparing bilateral investment treaty negotiations to contracts).

154. *See* Leila Nadya Sadat, *Crimes Against Humanity in the Modern Age*, 107 AM. J. INT'L L. 334, 352 (2013) (“The Diplomatic Conference rejected appeals from some governments to add economic and environmental crimes, preferring the list to include only crimes already found in other international instruments or clearly understood to be predicate acts of crimes against humanity under customary international law.”).

155. RICHARD K. GARDINER, *TREATY INTERPRETATION* 71 (2008).

156. *See* SLAUGHTER, *supra* note 20, at 49 (using FINCEN as an example of governments coming together to solve a common problem).

157. *See id.* at 250 (discussing the concept of positive comity).

158. *Id.*

for the conclusion of a more formal agreement.¹⁵⁹ Just as probable, however, regular informal engagement between participants may very well suffice to reap the coordinative benefits of network participation.¹⁶⁰

One of the consequences of global governance networks is the explosion of governance through parallel tracks.¹⁶¹ Global governance networks do not have a central global clearinghouse.¹⁶² Nor do global governance networks necessarily rely upon domestic coordination.¹⁶³ This means that global governance networks can exacerbate or create conflicts within states when different administrative departments are at odds with one another as to which agency has jurisdiction over a certain set of problems. Thus, one might imagine that the energy, interior, and environmental ministries of a country could be at odds with each other as to who has authority to regulate power plant or oil and gas production emissions. There is no guarantee that global governance networks would cross these silos—and every chance that competing networks could be formed.

2. The Relationship Between Global Governance Networks and Transnational Legal Process

Global governance networks and transnational legal process operate like flip sides of the same coin.¹⁶⁴ Transnational legal process thrives when there is robust engagement across national boundaries—and the more multilateral the exchange, the more robust is the exchange, interpretation, and internationalization of international norms in domestic discourse.¹⁶⁵ On the other hand, particularly

159. See Sloss, *supra* note 123, at 524–26 (outlining the formalization of discussions between California and Canadian provinces).

160. See SLAUGHTER, *supra* note 20, at 250 (using the example of antitrust cooperation).

161. See Slaughter, *Disaggregated Democracy*, *supra* note 147, at 1042 (noting that governance advocates rely upon governance “particularly through multiple parallel networks of public and private actors . . .”).

162. See Slaughter & Zaring, *supra* note 147, at 219 (“Networks combine central authority and decentralized actors, at least when they are constituted, as they increasingly are in the European Union, with a central node that functions as a secretariat and clearinghouse.”); Stephen Zamora, *Rethinking North America: Why NAFTA’s Laissez Faire Approach to Integration Is Flawed, and What to Do About It*, 56 VILL. L. REV. 631, 669 (2011) (noting that some North American network clearinghouses exist but that more would be desirable).

163. See SLAUGHTER, *supra* note 20, at 49 (giving examples of networks that come about even amidst a lack of domestic coordination).

164. See Waters, *supra* note 20, at 456 (discussing the relationship between global governance networks and transnational legal process theory).

165. Compare Slaughter & Burke-White, *supra* note 147, at 117 (noting the importance of the growth of governance networks), with Koh *TLP*, *supra* note 11, at 194–206 (outlining the

informal global governance networks function because the engagement in these networks by participants from various backgrounds creates the kind of stickiness theorized by transnational legal process.¹⁶⁶

The immediate consequence of this relationship is that global governance networks create conduits for norm internalization. Global governance networks internalize the problem solutions adopted by other network participants as their own and self-impose limitations upon their own choices.¹⁶⁷ These solutions therefore become sticky because of the underlying path dependence created by the continued engagement by network participants with each other and their shared interpretation of internalized norms.¹⁶⁸

The central feature of stickiness through networked norm internalization is reliance.¹⁶⁹ Network participants act in reliance upon the continued coordinative efforts by other participants.¹⁷⁰ Global governance network are premised upon the assumption that networked coordination creates shared benefits for all participants.¹⁷¹ Shared benefits depend upon the honest and reasonable contribution to the network by all participants. One participant's failure to contribute can create windfalls for that member from the efforts of its peers. When this windfall imposes disproportionate burdens on the remaining participants, serious disincentives of further participation in the network arise.¹⁷² In the worst case, networks will fall apart and the

functioning of transnational legal process along similar lines).

166. Harold H. Koh, *The Trump Administration and International Law*, 56 WASHBURN L.J. 413, 446 (2017) ("What all of this again reminds us is that deals are sticky and global governance regimes are path-dependent. As these regimes develop, they take on a life of their own—building consensus about what set of norms, rules, principles, and decision-making procedures should apply in a particular issue area. Intricate patterns of layered public and private cooperation develop, and formal lawmaking and institutions eventually emerge. These patterns create stiff paths of least resistance from which new political leaders can deviate only at considerable cost.").

167. See Koh *TLP*, *supra* note 11, at 194–206 (using examples of when nations have obeyed international law to show the internalization of norms).

168. See Koh, *supra* note 166, at 446 (using the Iran Deal to show that deals are sticky and global governance regimes are path-dependent).

169. See Frederic G. Sourgens, *Climate Commons Law*, 50 N.Y.U. J. INT'L L. & POL. 885, 934–44 (arguing that the United States has certain legal obligations because of other countries' reliance on its commitments); Frederic G. Sourgens, *Supernational Law*, 50 VAND. J. TRANSNAT'L L. 155, 184–95 (2017) (explaining that unilateral acts protect reliance interests).

170. See SLAUGHTER, *supra* note 20147, at 250 (discussing positive comity).

171. *Id.*

172. See Pierre-Hugues Verdier, *Transnational Regulatory Networks and their Limits*, 34 YALE J. INT'L L. 113, 125–26 (2009) (comparing the risk of opportunistic defection in the regulatory context to the Prisoner's Dilemma).

benefit of coordination will be lost.¹⁷³ Transnational legal process describes the process that counteracts this potential for decay.

B. *State Participation in Global Governance Networks*

In light of the discussion so far, Koh's statement that "norm internalization goes all the way down"¹⁷⁴ suggests that state officials participate in global governance networks. More accurately, the interactions permitted by global governance networks will exponentially increase the opportunity for engagement and interpretation of international norms by state actors.¹⁷⁵ The statement that norm internalization goes all the way down is practically more meaningful to the extent that it could be established that state officials in fact participate on a regular basis in global governance networks.

State officials do in fact participate in a host of global governance networks.¹⁷⁶ These networks typically form in the same manner that they do on the national level. They rely upon an exchange between different subject matter regulators sharing in joint problems.¹⁷⁷

It is on the whole uncontroversial that state regulators participate in informal networks. Many of these networks form as part of conferences or panel discussions. To give one recent example of such an exchange, a 2016 panel discussion in Houston brought together the oil and gas regulators of the State of Texas with their foreign counterparts from Mexico and Brazil.¹⁷⁸ Learned societies frequently form one umbrella in which such exchanges can be further cultivated through panel discussions and informally after sessions are concluded.¹⁷⁹

173. See *id.* (arguing that in light of disincentives, cooperation will break down).

174. Koh, *supra* note 9.

175. See Koh, *supra* note 135, at 2618 ("Through [an] interactive process, . . . law helps translate claims of legal authority into national behavior.").

176. GLENNON & SLOANE, *supra* note 16, at 277–89.

177. See *id.* at 280 ("virtually all of them have the same limited function – coordinating activities by Border States in sharing information, resources or costs within a transboundary region") (quoting Duncan Hollis, *The Elusive Foreign Compact*, 73 MO. L. REV. 1071, 1076 (2008)).

178. See *The Inter-American Hydrocarbon Regulators Dialogue*, U. HOUS. (Oct. 7, 2016), <http://law.uh.edu/eenrcenter/Inter-American/Conference.asp>.

179. See *The Use of Force Against Non-State Actors*, AM. SOC'Y INT'L L. 38 (Apr. 5, 2018), https://www.asil.org/sites/default/files/annualmeeting/pdfs/AM_Program.pdf (last visited Mar. 11, 2019) (bringing together Australian, Brazilian, Danish and UK officials to exchange on the legality of use of force against non-state actors).

State regulators further serve in formal global governance networks. One such example is the U.S.-Canada Transportation Border Working Group (TBWG). The TBWG is tasked with facilitating “the safe, secure, efficient, and environmentally responsible movement of people and goods across the Canada-U.S. border.”¹⁸⁰ The TBWG is a formal network created by an October 13, 2000, Memorandum of Cooperation between the U.S. and Canadian governments.¹⁸¹ The TBWG importantly includes not just federal officials from the respective governments of the U.S. and Canada but also state and provincial representatives from affected states and provinces such as Michigan and Ontario.¹⁸²

The current conflict between the federal government and U.S. states with regard to climate change suggests that states are willing to take a more active part in more formal global governance networks traditionally reserved to the national federal government.¹⁸³ The first meeting of the parties to the UN Framework Convention on Climate Change (UNFCCC) following the statement of U.S. intent to withdraw from the Paris Agreement is a case in point.¹⁸⁴ The Paris Agreement is a treaty concluded under the auspices of the UNFCCC.¹⁸⁵ The intended withdrawal from the Paris Agreement by the U.S. thus created friction for the U.S. for purposes of the Conference of the Parties meeting convened in Bonn following the announced withdrawal.¹⁸⁶

In part in response to the U.S. withdrawal from the Paris Agreement, U.S. states sent delegations to the conference of the parties meeting in Bonn.¹⁸⁷ These delegations were larger than the U.S. delegation—and far more vocal and supportive of the underlying

180. TBWG, http://www.thetbwg.org/index_e.htm (last visited Mar. 11, 2019).

181. Memorandum of Cooperation, TBWG (Oct. 13, 2000), http://www.thetbwg.org/about-memorandum_e.htm.

182. See TBWG Directory, http://www.thetbwg.org/about-directory_e.htm (last visited Mar. 11, 2019).

183. See Sloss, *supra* note 123, at 521–22 (discussing the increasing willingness of U.S. states to form foreign state agreements in recent years in light of the Supreme Court’s Compact Clause doctrine).

184. See Sourgens, *Climate Commons Law*, *supra* note 169, at 937 (discussing the “shadow delegation” sent by U.S. states and municipalities following the Trump Administration’s announced withdrawal from the Paris Agreement).

185. *Id.* at 901–02.

186. *Id.* at 936–37 (describing the protests by France, Germany, Italy, and China in response to the U.S. withdrawal from the Paris Agreement).

187. *Id.* at 937.

goals of the Paris Agreement.¹⁸⁸ In fact, these delegations sought to assure official delegates of continued commitment by large U.S. states to the U.S. climate change mitigation goals expressed in the nationally determined commitment.¹⁸⁹

The reception of the state delegations evinces the fluid and flexible nature of global governance networks. The state delegations could not participate in the formal sessions reserved for official national delegations.¹⁹⁰ But the state delegations did engage in exchanges with their foreign national on the back of the official schedule.¹⁹¹ These delegations thus used official formal networks to create an informal network in their shadows—and to communicate a policy position that directly contradicted the position taken by their national government in official, formal proceedings.¹⁹²

In short, Koh's observation that internalization goes all the way down correctly identifies that state officials are active participants in global governance networks.¹⁹³ These networks tend to be more informal than the formal networks created by multilateral treaties. These networks nevertheless present the same opportunities for exchange. Consequently, states have meaningful opportunities to engage, interpret, and internalize international norms as a matter of state law and state regulation. They further have meaningful opportunities to do so in defiance of, and resistance to, federal, national positions.

C. *Resistance and Friction Between Global Governance Networks*

The global governance network perspective speaks directly to the issue under-theorized by the foreign affairs literature: the potential for friction between state law and federal foreign policy, or resistance by state law to federal foreign policy. As a matter of current affairs,

188. See *id.* (citing Lisa Friedman, *A Shadow Delegation Stalks the Official U.S. Team at Climate Talks*, N.Y. TIMES (Nov. 11, 2017), <https://www.nytimes.com/2017/11/11/climate/un-climate-talks-bonn.html>).

189. See *id.*

190. See *id.*

191. *Id.*

192. *Id.*

193. See Koh *TLP*, *supra* note 12, at 206 (“[N]ations will come into compliance with international norms if transnational legal processes are aggressively triggered by other transnational actors in a way that forces interaction in forums capable of generating norms, followed by norm-internalization. This process of interaction and internalization in turn leads a national government to engage in new modes of interest-recognition and identity-formation in a way that eventually leads the nation-state back into compliance.”).

the ongoing conflict between states like California and other like-minded states on the one hand, and the Trump administration on the other hand, highlights that global governance networks create the potential for friction between a national government and state governments.¹⁹⁴ This conflict potential so far appears to be reasonably binary: it could be cast as resistance by state actors (the delegations from California and other states) against the attempts at defection of a national actor (the Trump administration) from a global governance network (the Paris Agreement).¹⁹⁵

Such a binary view would, however, be overly simplistic because it fails to capture that global governance networks create significant friction due to resistance *between* networks beyond just the simple defection scenario. The fact that states form part of global governance networks therefore has significantly more far reaching consequences than the Californian conflict with the Trump administration might at first suggest.

The global-governance-network perspective thus permits one to put a finer point on this phenomenon. The foreign affairs literature so far has struggled with theorizing how conflicts between state laws and federal foreign policy should be approached.¹⁹⁶ The global governance network perspective permits several conclusions that will aid in gaining a better understanding of these conflicts.

First, the transnational legal process inherently and necessarily creates friction across global governance networks. The transnational legal process of norm internalization is situation dependent: interpretation and internalization of norms is context-specific to the situation in which a global norm was encountered (that is, the “interaction” triggering it).¹⁹⁷ Global governance networks, in turn, define the parameters in which network participants encounter and interpret norms.¹⁹⁸ This means that the multiplicity of networks

194. See Oliver Milman, *Paris Deal: A Year After Trump Announced US Exit, a Coalition Fights to Fill the Gap*, THE GUARDIAN (June 1, 2018), <https://www.theguardian.com/us-news/2018/may/31/paris-climate-deal-trump-exit-resistance> (describing the tensions between the Trump Administration and resistant state governments and business leaders in light of the Administration’s withdrawal from the Paris Agreement).

195. See *id.*

196. See *supra* section I.C.

197. See Harold H. Koh, *Jefferson Memorial Lecture - Transnational Legal Process After September 11th*, 22 BERKELEY J. INT’L L. 337, 339 (2004) (“Those seeking to embed certain norms into national conduct seek to trigger interactions that yield legal interpretations that are then internalized into the domestic law of even resistant nation states.”).

198. See Slaughter, *Disaggregated Democracy*, *supra* note 147, at 1042 (noting the existence

invariably leads to a certain amount of substantive norm fragmentation or divergence between different networks.¹⁹⁹ Each network interprets norms in light of their own specific problem-horizon or context.²⁰⁰ Consequently, each network (and a participant within each network) internalizes these norms in a manner that is highly context dependent. As context does not duplicate between networks, divergence—friction—is pre-programmed.²⁰¹

Second, with friction pre-programmed, the dynamics of global governance network sustainability also lay the seeds for latent conflicts between networks. The continued functioning of a specific network depends upon the continued adherence of network participants to shared norm interpretations.²⁰² As the network depends for its sustainability on this shared norm internalization, it will naturally resist the external imposition of a rival norm.²⁰³ It will do so irrespective of whether the rival norm is the result of nationalist, mercantilist, or nativist jingoism or the result of a norm that is the

of parallel networks); Slaughter, *A NEW WORLD ORDER*, *supra* note 20, at 49 (noting the function of *ad hoc* networks).

199. See, e.g., Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007) (arguing that the fragmentation of international law reflects a dangerous, nonegalitarian system undermining the integrity of international law); Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2004) (rejecting that epistemic communities in international law could be governed by a market place of ideas); Stephan, *supra* note 22, at 1578–79 (“Privatization that destabilizes the domain of international law by making it less clear where international rules apply thus produces high costs that require exceptional justification.”).

200. See HANS-GEORG GADAMER, *TRUTH AND METHOD* 317 (Joel Weinsheimer & Donald G. Marshall trans., Bloomsbury Pub. 2004) (discussing the fusion of horizons).

201. I am indebted with regard to this insight to Craig Martin, who formulated a similar point as a critique to transnational legal process theory in the context of the *jus ad bellum* discourse. See Craig Martin, *Symposium: The Assumptions of Koh's Transnational Legal Process as Counter-Strategy*, OPINIO JURIS (Feb. 26, 2018), <http://opiniojuris.org/2018/02/26/symposium-the-assumptions-of-kohs-transnational-legal-process-as-counter-strategy/> (“But such interpretation and internalization will only result in compliance with international law if the interpretation itself is at least within a range of reasonable interpretations consistent with established principles of international law. If the interpretation is outside of such reasonable range, and moreover if it is a deliberate and instrumental effort to cloak or rationalize a departure from international law, then it is difficult to see how the process will result in compliance.”).

202. See Nathan Gibbs, *Human Rights, Symbolic Form, and the Idea of the Global Constitution*, 18 GERMAN L. J. 511, 526–27 (2017) (discussing the nature of self-referential discourses in transnational law).

203. See Martti Koskeniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 566 (2002) (highlighting the tensions between jurisprudential approaches taken by the International Criminal Tribunal for the Former Yugoslavia and the International Court of Justice).

result of a rival interpretation and internalization from a competing global governance network. Short of combining networks to coordinate norm interpretations, in other words, resistance *between* networks is just as probable to occur as conflicts with nationalist “network deniers.”²⁰⁴

Transnational legal process and global governance networks thus provide a means through which norm conflicts through the resistance between networks continue to propagate. This is not necessarily a negative. Rather, it reflects that value demands in any political sphere, including the global sphere, are necessarily plural and, as such, necessarily in some degree of competition with each other.²⁰⁵

The value added by switching from a traditional foreign affairs perspective to a networked transnational legal process perspective should by now be readily apparent. What appeared as a purely political question in the foreign affairs literature—conflicts between state legislators and the federal government—is now legally cognizable.²⁰⁶ Transnational legal process and global governance networks are *legal* phenomena subject to legal analysis. Placing conflict between state law and federal foreign policy in this new rubric of friction between governance networks thus permits a more nuanced jurisprudential understanding of why and how processes already theorized in legal scholarship result in conflicts that previously had been considered to reside exclusively in the political realm.

D. *States of Resistance: The Topography of State-National Network Conflicts*

The switch to a global governance network/transnational legal perspective allows a more nuanced view as to why and how different kinds of conflicts between state law and federal foreign policy can arise by focusing on the differing states of resistance between state and federal network participants. As this section will show, not all of this resistance is created equal. Rather, the dynamics of transnational legal processes channel this resistance or friction along predictable—

204. See Stephan, *supra* note 22, at 1650 (outlining the danger of such competition for the “preserv[ation of] clear and stable domain rules.”).

205. See Frederic G. Sourgens, *Functions of Freedom: Privacy, Autonomy, Dignity, and the Transnational Legal Process*, 48 VAND., 48 VAND. J. TRANSNAT’L L. 471, 497–500 (2015) (outlining the value of pluralist conceptions of transnational law in a process frame).

206. See Section I.C.

and more readily ascertainable—pathways that can then be subject to more nuanced legal analysis in their own right. To fully understand the potential for resistance and friction inherent in treating states as fully-fledged actors in global governance networks, it is therefore necessary to map how conflicts could arise. This section proposes such a topography of five potential states of resistance between state and federal government actors consisting of conflict as: (1) a state check on federal defection, (2) the use of states as allies in an ongoing clash between multiple networks to which the federal government contributes, (3) state assertions of interests through their own autonomous networks in which the federal government does not take part, (4) state defection from federal networks, and (5) differences in amplitude of state and federal commitments to goals articulated in shared networks.²⁰⁷

1. Check on Defection

The first, and most severe, friction between states and the federal government arises in the context of the defection by either state or federal participants in a network and the resistance to this defection by the respective other actor. A complete defection occurs when the federal government is a network participant in an existing network and seeks to leave the network in question. This is typically the case in the context of a change in administration following a presidential election. The defection by the Trump administration from the Paris Agreement is an example of such an effective defection from a global network.²⁰⁸

The state government can act as a check on defection, that is, resist it, by seeking to step into the shoes of the defecting federal government. It would then seek to use its own legislative and regulatory powers in order to meet network expectations. It would do so in the face of contrary deregulatory moves by the federal government.²⁰⁹

The state government in this scenario will also seek to continue the engagement with other network participants. It will do so by

207. HAROLD D. LASSWELL & MYRES S. MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY 33 (1992) (discussing the importance of drawing up a “comprehensive map of demanded values and of institutional practices by which values are shaped and shared”).

208. For a discussion of this defection, see Sourgens, *Climate Commons Law*, *supra* note 169.

209. See Popovich, *supra* note 2.

seeking out opportunities for continued, typically informal exchanges with other network participants.²¹⁰ This effort can lead to strengthened internalization of shared network norms in excess of earlier federal commitments over time.²¹¹ In other words, the states would continue to participate in the network in earnest rather than simply maintaining a status quo. This continued engagement is inherent in network participation and the continued engagement such participation entails with fellow regulators. This engagement will lead to new interpretations and internalization of norms that will then be applied by states in their own regulatory processes.

The longer a defection conflict is allowed to persist, the more pronounced the friction created by state resistance will become. For instance, state governments in this case will continue progressively to develop and apply international norms.²¹² The federal government, on the other hand, sought to defect from these norms at an earlier stage of development—and of ambition.²¹³ This friction, therefore, can have drastic consequences.

2. States as Allies in Friction between National Networks

A different state of resistance arises when state governments take sides in ongoing friction between two or more networks in which national governmental actors participate. In this scenario, state actors will share in the same norm interpretations and norm internalizations with some national actors but resist the rival norm internalizations of other networks in which national actors also participate.

To the extent that a different global governance network conflicts with the network in which state and national actors cooperate with each other, the state regulators will become natural allies for the affected national regulators. State regulation would shore up the position of the national regulator and provide further cooperation

210. See Erik Kirschbaum, *California Gov. Jerry Brown Delivers a Blunt Climate Change Message in Germany*, L.A. TIMES (Nov. 8, 2017), <http://www.latimes.com/world/europe/la-fg-germany-jerry-brown-climate-change-20171108-story.html> (reporting on the California governor's tour to continue climate change mitigation efforts).

211. See Jean Chemnick, *Cities and States Are Picking Up Trump's Slack on Climate*, SCI. AM. (Sept. 22, 2017), <https://www.scientificamerican.com/article/cities-and-states-are-picking-up-trumps-slack-on-climate/> (a group of states “unveiled research Wednesday showing that participants in the alliance are on track to meet or exceed their share of the Obama-era nationally determined contribution to Paris, which called for a 26 to 28 percent cut in emissions by 2025 compared with 2005 levels.”).

212. See *id.*

213. See *id.*

across national-state divides. State legislators or regulators in this context would contribute to an ongoing battle for competence between different federal/ national agencies by resisting against the proposed norm internalizations from the rival national network with the promulgation of state laws or regulations.

Massachusetts's so-called "Burma law" on closer inspection is one such example that gained notoriety in the foreign affairs literature. Massachusetts in 1996 passed a law boycotting companies doing business in Burma, citing human rights concerns.²¹⁴ The law was the result of an informal participation by Massachusetts lawmakers in a loose, broad human rights network.²¹⁵ As one commentator noted, as of June 2000, "twenty-four municipal, county, or state governments had enacted selective purchasing laws specifically targeting Burma."²¹⁶

The actions by Massachusetts pitted human rights concerns—and human rights networks—against free trade concerns and free trade networks.²¹⁷ Free trade advocates were quick to assert that the measure was inconsistent with U.S. commitments made before the World Trade Organization.²¹⁸ By passing its "Burma law," Massachusetts, and other states and municipalities, became the champion of human rights networks—and an opponent of champions from free trade networks.

The U.S. Supreme Court eventually struck down the Massachusetts law as standing as obstacle to national foreign policy.²¹⁹ By the time the measure reached the Supreme Court, Congress had passed its own law relating to sanctions on Burma.²²⁰ The Supreme Court reasoned that the Massachusetts law encroached upon discretion granted to the President under the federal statute because the Massachusetts law stood as an obstacle to the execution of federal

214. Peter L. Fitzgerald, *Massachusetts, Burma, and the World Trade Organization: A Commentary on Blacklisting, Federalism, and Internet Advocacy in the Global Trading Era*, 34 CORNELL INT'L L.J. 1, 2 (2001).

215. *Id.* (describing a meeting between Massachusetts Representative Byron Rushing and Simon Billeness, a key figure in the Free Burma Coalition, wherein the two discussed anti-apartheid legislation).

216. *Id.* at 7.

217. *See id.* at 53.

218. *Id.* at 13.

219. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

220. *Id.* at 368 ("[T]hree months after the Massachusetts law was enacted, Congress passed a statute imposing a set of mandatory and conditional sanctions on Burma.").

Congressional intent.²²¹ The Supreme Court thus took sides in the conflict between federal and state action.²²²

Importantly, however, the resistance created by the Massachusetts law and others like it was instrumental in bringing about a federal program imposing different sanctions on Burma for its human rights abuses. As Glennon and Sloane point out, “local actors at the state and municipal levels took the initiative to advance values (e.g., political reform in Burma, international human rights protection) that might otherwise have been marginalized.”²²³ Although the Massachusetts Burma law facially failed (it was struck down by the Supreme Court), its enactment had a lasting policy impact by providing human rights advocates at the U.S. federal level with the needed political urgency to adopt a federal program.²²⁴ In other words, the insertion of Massachusetts into the friction between trade and human rights networks—both networks to which the United States belongs—created additional resistance against free trade norm internalizations that materially moved the direction of U.S. foreign policy towards the human rights network.

3. States as Source of New Network Conflicts

Friction can also arise when states enter into global governance networks from which the national government is absent. Such networks can form when one or several states confront regulatory problems that are inherent in a particular environment. The overall policy problems faced by the state government may very look different from the policy concerns of the federal government and thus lead to the creation of competing global governance networks.

One example of such a potential policy conflict is the Arctic. The Arctic is subject to a national multilateral treaty to which the U.S. is a party, the Arctic Council.²²⁵ At the same time, Alaska has established a state-based commission to deal with Arctic problems, the Alaska Arctic Policy Commission.²²⁶ One of the policy goals of the Alaska Arctic Policy Commission is to “[s]trengthen and expand cross-border

221. *Id.* at 373, 385.

222. *Cf. id.*

223. GLENNON & SLOANE, *supra* note 16, at 299.

224. *Id.*

225. For a discussion of the formation of the Arctic Council, see Evan T. Bloom, *Establishment of the Arctic Council*, 93 AM. J. INT’L L. 712 (1999).

226. Final Report and Implementation Plan, Alaska Arctic Policy Commission (Jan. 30, 2015), http://www.akarctic.com/wp-content/uploads/2015/01/AAPC_Exec_Summary_lowres.pdf.

relationships and international cooperation, especially bilateral engagements with Canada and Russia.”²²⁷ This goal is separate and apart from efforts to “[s]ustain and enhance state participation in the Arctic Council.”²²⁸

The Alaska Arctic Policy Commission has already made statements that, on their face, would appear to enter into traditional areas of foreign policy and are inconsistent with federal policy at this point. Thus, for reasons to do with rights to the Arctic codified in the United Convention on the Law of the Sea—a treaty the United States Senate steadfastly refuses to ratify—the Commission “[r]eiterate[d] the state’s long-time support for ratification of the Law of the Sea Treaty.”²²⁹

The entry into global governance networks by states, through which states deal directly with their foreign counterparts to address predominantly local problems, can lead to an internalization of different norms from the ones internalized at the national level. This can lead to norm conflicts particularly when the norms at issue at the local level concern environmental regulations or matters pertaining to cultural rights of local indigenous peoples.

4. States as a Drag on Creations of New National Networks

At the same time, friction can also arise when the federal government enters into new global governance networks without the states on issues that have strong implications for traditional state regulation. In such instances, the new national or federal networks will produce results that may well be at odds with the policy of state governments—and with established global governance networks of which the states form part.

In such instances, states may very well resist the full enforcement of a global understanding. One example of this situation is the enforcement of the Vienna Convention on Consular Relations.²³⁰ As one scholar noted, “[t]he U.S. government considers consular notification requirements to be extremely important.”²³¹ The Vienna

227. *Id.* at 10.

228. *Id.*

229. *Id.*

230. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention].

231. Anthony N. Bishop, *The Unenforceable Rights to Consular Notification and Access in the United States: What’s Changed Since the Lagrand Case?*, 25 HOUS. J. INT’L L. 1, 11 (2002).

Convention in fact ultimately included a right to consular notification and access in its Article 36.²³² The United States actively continued to remain involved in transnational legal processes relating to consular notification obligations.²³³

Meanwhile, U.S. *state* law enforcement officers did not abide by the consular notification requirements established in the Convention and thus resisted its intended implementation.²³⁴ Paraguay, Germany, and Mexico each brought claims against the United States under the Vienna Convention before ICJ in cases in which Panamanian, German, and Mexican nationals, respectively, were not informed of their consular rights and subsequently sentenced to death in capital murder cases.²³⁵ The ICJ found the United States liable and ordered that executions not be carried out. The United States sought to comply with the order.²³⁶ This result is consistent with the overall international legal framework and global governance networks as they were internalized at the U.S. State Department.²³⁷

Texas, in particular, resisted the attempt to have the order enforced and pursued litigation on the issue to the United States Supreme Court.²³⁸ Texas successfully argued before the Supreme Court that the treaty pursuant to which the ICJ judgment was rendered was not self-executing and that it consequently did not benefit from the Supremacy Clause's displacement of inconsistent state law. The state in that particular instance successfully resisted the imposition of new obligations through international legal processes—somewhat to the chagrin of the U.S. State Department.²³⁹

232. See Vienna Convention, *supra* note 230, at art. 36.

233. Roberto Iraola, *Federal Criminal Prosecutions and the Right to Consular Notification under Article 36 of the Vienna Convention*, 105 W. VA. L. REV. 179, 184–88 (2002) (discussing internal state department and justice department interpretations of Article 36).

234. For a discussion of state law treatment of the consular notification right in Article 36 of the Vienna Convention, see Alberto R. Gonzales & Amy L. Moore, *No Right At All: Putting Consular Notification in its Rightful Place After Medellin*, 66 FLA. L. REV. 685, 712–15 (2014).

235. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. 12, 19–20 (Mar. 31); *LaGrand (Ger. v. U.S.)*, 2001 I.C.J. 446, 477–78 (June 27); Vienna Convention on Consular Relations (Para. v. U.S.), Provisional Measure, 1998 I.C.J. 248, 249 (Apr. 9).

236. See Vienna Convention on Consular Relations (Para. v. U.S.), Provisional Measure, 1998 I.C.J. 248, 256 ¶ 29 (Apr. 9).

237. See Iraola, *supra* note 233, at 184–88 (discussing internal state department and justice department interpretations of Article 36).

238. *Medellin v. Texas*, 552 U.S. 491 (2008).

239. See *id.* at 514–15; see also Janet Koven Levit, *Does Medellin Matter?*, 77 FORDHAM L. REV. 617, 617 (2008).

5. Potential Amplitude Conflicts within Shared Networks

The most common friction can arise when certain states disagree with the level of federal commitment with regard to a global governance issue that specifically affects the states in question. California again provides a good example. As Professor Daniel A. Farber notes, “the expansion of environmental law beyond the traditional borders of federal environmental regulation is already well underway in California.”²⁴⁰ As he explains, the California initiative can be traced back to 2006 when Governor Schwarzenegger “signed into law the capstone of the State’s climate policy, the *California Global Warming Solutions Act of 2006*.”²⁴¹ This California initiative was firmly embedded in global governance networks:

This law generated world-wide attention, including a statement by the British Prime Minister that its signing represented a “historic day for the rest of the world as well.” The Prime Minister and the Governor of California also entered into an agreement to share best practices on market-based systems and to cooperate to investigate new technologies; similar agreements now exist between California and states and provinces in Australia and Canada.²⁴²

Action by California in 2006 does not represent a reaction to a defection by the federal government from global climate networks. The Bush administration continued to participate—anemically—in United Nations Framework Convention on Climate Change proceedings.²⁴³ Although California’s action stands against the backdrop of a U.S. withdrawal from the Kyoto Protocol, this withdrawal was telegraphed unanimously by the U.S. Senate during the Kyoto negotiations on the basis of distinct policy disagreements on the importance of developing country participation in climate change mitigation measures.²⁴⁴ In other words, California wished to do

240. Daniel A. Farber, *California Climate Law—Model or Object Lesson?*, 32 PACE ENVTL. L. REV. 492, 497 (2015).

241. *Id.* at 493.

242. *Id.* at 493–94.

243. See Cinnamon Carlarne, *Notes from A Climate Change Pressure-Cooker: Sub-Federal Attempts at Transformation Meet National Resistance in the USA*, 40 CONN. L. REV. 1351, 1361 (2008) (“President Bush’s climate change plan is based on reducing greenhouse gas ‘intensity,’ which measures the ratio of greenhouse gas emissions to economic output. The initiative calls for an 18 percent reduction in greenhouse gas intensity by 2012. Nowhere does the plan commit to, or support, absolute reductions in greenhouse gas emissions.”).

244. See Cass R. Sunstein, *Of Montreal and Kyoto: A Tale of Two Protocols*, 38 ENVTL. L. REP. NEWS & ANALYSIS 10566, 10568 (2008) (citing the U.S. Senate’s unanimous adoption of a resolution asking President Clinton not to agree to limits on greenhouse gas emissions if such

more than the federal government on combatting climate change. It did not wish to do the opposite.

In such scenarios, it is possible that the federal government would permit states to act more aggressively than the national government to meet policy goals through global governance networks.²⁴⁵ Thus, a policy may fail for political reasons at the national level but, rather than act to preempt state action, the federal government could leave some implementation to the states.

It is similarly possible, however, that the federal government would affirmatively seek to set a ceiling on the implementation of global governance network goals.²⁴⁶ This may be the case because the federal government is seeking to develop leverage for a broader resolution of a larger set of problems, or it may be the case due to the political commitment by the federal government to the global governance network goals.²⁴⁷ But, in either case, the situation is fundamentally different from an outright federal network defection as the federal government would still, in theory, advance a good faith position within the network with which the state government would disagree.

E. *Conclusion*

The current conflict between California and the Trump administration with regard to climate change mitigation efforts clearly fits within the first category of states of resistance brought about by state participation in global governance networks.²⁴⁸ California wishes to safeguard U.S. participation in the Paris Agreement whereas the Trump administration has both indicated its desire to defect from the Paris framework and has taken steps to undo most if not all all those policy initiatives that underpinned U.S. Paris participation.²⁴⁹ The analysis of the current situation might very well fall prey to a variation on the old adage that hard cases make bad law—seemingly easy cases

agreements would be detrimental to U.S. economic interests).

245. See Carlarne, *supra* note 243, at 1380 (discussing the importance of networked coordination by states).

246. See *id.* at 1388–90 (discussing the resistance by the Bush administration to California initiatives and the national political deadlock in which it took place).

247. See GLENNON & SLOANE, *supra* note 16, at 298–99 (discussing obstacle preemption).

248. See, e.g., Chemnick, *supra* note 211 (explaining the tensions between state leaders and the Trump Administration and attributing to former California governor Jerry Brown the idea “that the United States’ authority to make emissions reductions is decentralized, and subnational actors will do much of the heavy lifting to achieve their country’s Paris targets”).

249. See *id.*

can make bad law, too.²⁵⁰ On its face, President Trump's defection from existing U.S. international climate commitments exhibits the kind of "intuitively sensed obviousness" of executive wrongdoing that might well "induce[] a rush to judgment."²⁵¹ It would therefore be easy to follow one's gut and accept a legally convenient rationale for a politically desirable result, thus supporting California's action because of a fundamental disagreement with the style and substance of the Trump administration's foreign and energy policies. This, however, would simply propagate the problem already identified at the end of the previous section: where one stands on issues of foreign affairs powers appears to depend upon where one sits politically on any given question.

The rubrics of states of resistances luckily have provided a far richer theoretical toolkit with which to appraise this question. They have made it possible to abstract from the particulars of a specific dispute and identify core features of legal process that generate conflicts between state law and federal foreign policy. This more nuanced understanding of what previously were "political questions," in the colloquial if not in the legal sense, thus allows one to more fully grasp "the internal coherence or future ramifications" of any one approach to resolving the constitutional conflict between states and the federal government.²⁵²

The rubric is also far more useful beyond the narrow circumstances of today's current affairs. Conflicts like the one presented by the Trump administration have been reasonably rare. On the other hand, conflicts that arise out of regime clash or fragmentation of global governance networks, such as the clash of free trade and human rights networks, or in the context of different amplitudes of reaction within the same network, such as the clash between California and the federal government on climate change policy in the George W. Bush presidency, will become increasingly more commonplace in light of the realities of globalization.²⁵³ Both the arguments that states should be allowed to act as a check or balance on federal foreign policy and the manner in which states would do so look markedly different in this context.

250. *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 804 (1980) (Blackmun, J., concurring).

251. *Id.*

252. *Id.*

253. *See* Section III.

III. THE STATES' CONSTITUTIONAL POWER TO PARTICIPATE IN GLOBAL GOVERNANCE NETWORKS

The Article so far showcases the difficulty for the foreign affairs law literature to define precisely when federal foreign *policy* can preempt state *law*. It reframes this problem through the lens of the transnational legal process global governance network literature. It shows how participation by states in these processes naturally leads to the kind of policy conflicts that create problems for the foreign affairs law literature, and it draws a more detailed map of potential types of conflict between state law and federal policy than was previously possible. But this still does not answer the broader question: Does this switch in frame also permit more granular conclusions about the constitutionality of such state action?

A. *The Constitutional License to Network*

1. The Compact Clause and Global Governance Networks

The foreign affairs literature provides an important starting point for analyzing the constitutionality of state participation in global governance networks. The literature so far has focused on the instruments setting up global governance networks in which states participate.²⁵⁴ These instruments typically provide for how state actors will interact with one other, exchange information, etc.²⁵⁵ Global governance networks form when states can interact with foreign entities regularly, making this literature directly relevant to the current inquiry.²⁵⁶

The starting point identified by the literature is the Compact Clause.²⁵⁷ Thus, the Constitution narrowly prohibits the states from

254. See, e.g., Sloss, *supra* note 123, at 524–26 (discussing California's climate action in concert with Canadian provinces in the context of the Compact Clause); GLENNON & SLOANE, *supra* note 16, at 277–91 (engaging frameworks for state-based cooperation through the lens of the Compact Clause); Duncan B. Hollis, *The Elusive Foreign Compact*, 73 MO. L. REV. 1071, 1076 (2008) (outlining existing state practice under the Compact Clause).

255. See, e.g., Sloss, *supra* note 123, at 524–26 (discussing California's climate action in concert with Canadian provinces in the context of the Compact Clause); Duncan B. Hollis, *The Elusive Foreign Compact*, 73 MO. L. REV. 1071, 1076 (2008) (outlining existing state practice under the Compact Clause).

256. SLAUGHTER, A NEW WORLD ORDER, *supra* note 20, at 49.

257. See, e.g., Sloss, *supra* note 123, at 524–26 (discussing California's climate action in concert with Canadian provinces in the context of the Compact Clause); GLENNON & SLOANE, *supra* note 16, at 277–91 (engaging frameworks for state-based cooperation through the lens of the compact clause); Duncan B. Hollis, *The Elusive Foreign Compact*, 73 MO. L. REV. 1071, 1076 (2008) (outlining existing state practice under the Compact Clause).

entering into treaties, alliances or confederations with a foreign state.²⁵⁸ Further, the Constitution also prohibits the states from entering into “any Agreement or Compact” with a foreign power without Congressional approval.²⁵⁹ To the extent that the literature has discussed the relevant constitutional provisions on the permissibility of participation in global governance networks, it has done so in the context of this second provision.

In light of these prohibitions, the key constitutional question is whether global governance networks function like “any Agreement or Compact with another State, or with a foreign Power,” for which states would require “the Consent of Congress.”²⁶⁰ Article I, section 10 of the Constitution distinguishes between “Agreement or Compact” by context from “any Treaty, Alliance, or Confederation,” into which states categorically may not enter by a separate prohibition.²⁶¹ The “Agreement or Compact” thus by context is something short of a treaty, and therefore may be sufficiently broad to cover not just the agreements setting up global governance networks, but also the interaction taking part within them.

The early leading Supreme Court interpretation of the Compact Clause confirms this broad interpretation of “Agreement of Compact.” In *Holmes v. Jennison*,²⁶² the Court interpreted the term “Agreement” in the Compact Clause in the “broadest and most comprehensive terms” to cover express and implied agreements. The *Holmes* Court encountered the issue in the context of a habeas corpus motion made by George Holmes, a man wanted for murder in Quebec, who faced extradition to Canada pursuant to an informal agreement between the governor of Vermont and a British Canadian official.²⁶³ The United States Supreme Court in a plurality opinion struck down even such an informal agreement as violating the Compact Clause.²⁶⁴ It reasoned that an express formal agreement to extradite persons in Mr. Holmes position between the State of Vermont and British Canada would have been unconstitutional.²⁶⁵

258. U.S. CONST. art. I, § 10, cl. 1.

259. *Id.* at cl. 3.

260. *Id.*

261. *Id.* at cl. 1–3.

262. 39 U.S. 540, 572 (1840).

263. *Id.* at 541.

264. *Id.* at 579.

265. *Id.* at 572.

Consequently, achieving the same result through informal agreement should suffer the same fate. Thus, the plurality concluded:

[I]t was the intention of the framers of the Constitution to use the broadest and most comprehensive terms; and that they anxiously desired to cut off all connection or communication between a state and a foreign power: and we shall fail to execute that evident intention, unless we give to the word “agreement” its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties.²⁶⁶

This on its face would apply to global governance networks. Specifically, it would address formal agreements setting up these networks. But it would also cover more: it would place informal, ad hoc networks potentially within the scope of the Compact Clause. And it would place interactions in the network within the scope of the Compact Clause as well.

Problematically, as one commentator put it, “[o]ver time, this passage was variously cited with approval, viewed as overruled, and distinguished on the fact that the agreement at issue concerned extradition.”²⁶⁷ In fact, Congress does not seem to have held up its end of the bargain to police state conduct under the Compact Clause.²⁶⁸ Despite this apparent under-enforcement of the Compact Clause by Congress, there nevertheless remains the specter that it could be used in order to mount an attack on state conduct through global governance networks, as Sloss has convincingly demonstrated in the context of California’s climate compacts discussed above.²⁶⁹

2. Network Coordination vs. Compact Cooperation

This problem can be overcome by a careful reading of the *Holmes* decisions through the lens of global governance networks and transnational legal process concerns. Despite constituting the high water market of the Compact Clause, *Holmes* significantly limits the

266. *Id.*

267. Fabien Gelinas, *The Constitution of Agreement: A Brief Look at Sub-Federal Cross-Border Cooperation*, 2006 MICH. ST. L. REV. 1179, 1183 (2006) (citations omitted).

268. Hollis, *supra* note 257, at 1078 (“Congress has refused its consent to foreign participation in a compact exactly once - in the 1968 Great Lakes Basin Compact (and even then only at the behest of a U.S. State Department concerned about conflicts with U.S. treaty obligations). Nor has Congress ever challenged a U.S. state’s agreement as a prohibited treaty.”).

269. Sloss, *supra* note 123, at 524–26.

scope of the prohibition in the Compact Clause.²⁷⁰ Chief Justice Taney was careful to circumscribe his reasoning prohibiting the informal agreement between Vermont and British Canada. It was premised upon the factual predicate that Vermont “acts not with a view to protect itself, but to assist another nation which asks its aid.”²⁷¹

In other words, *Holmes* is express that its prohibition is in “no degree connected with the power of the states to remove from their territory any person whose presence they may think dangerous to their peace, or in any way injurious to their interests.”²⁷² Chief Justice Taney is explicit that “the ordinary police powers of the states, which is necessary to their very existence . . . have never surrendered to the general government.”²⁷³ The state, in other words, may always act in its own interest.

The rub of *Holmes* is that “[t]he state does not co-operate with a foreign government not [sic] hold any intercourse with it, when she is merely executing her police regulations.”²⁷⁴ The prohibition, even at its high water mark, requires some form of agreement that does not immediately advance the traditional police powers retained by the state.

The global governance literature suggests a new reading of this case. Global governance networks rest upon the internalization of norms and coordination of behavior efficiently to achieve these internalized norms.²⁷⁵ Such networks do not rest upon traditional notions of cooperation, i.e. the bargained-for-exchange of something one oneself desires for something one is willing to give up to receive it.²⁷⁶ Global governance networks thus act on a unity of shared purposes, premised in shared internalized norms of network participants, and not traditional frameworks of dovetailing interests and the cooperative efficiencies they create.²⁷⁷

An example can help to illustrate this fundamental difference. States at times offer tax breaks to multinational companies to relocate

270. Gelinas, *supra* note 267, at 1183 (citations omitted).

271. *Holmes*, 39 U.S. at 569.

272. *Id.* at 568.

273. *Id.*

274. *Id.* at 569.

275. See Section II.A.

276. Sourgens, *supra* note 41, at 25.

277. *Id.*; see also ROGER FISHER, GETTING TO YES, NEGOTIATING AGREEMENT WITHOUT GIVING IN 75 (3d ed. 2011) (discussing dovetailing differing interest in cooperative bargaining).

their headquarters.²⁷⁸ When a state offers such tax breaks, it is not acting on the basis of an internalized norm that taxing multinational companies is wrong.²⁷⁹ The tax break is bargained for and in exchange for the jobs and economic activity that the multinational company would bring to the state.²⁸⁰ The multinational and the state are thus cooperating in bringing new economic activity to the state.²⁸¹ They are not, however, coordinating their behavior through a tax governance network.

This perspective is helpful for understanding the consequence of *Holmes* for global governance networks. *Holmes* prohibits cooperation by states without Congressional approval under the Compact Clause.²⁸² In *Holmes*, this “cooperation” was the bargained-for-exchange of the extradition of Holmes in implied exchange for future reciprocation of some sort.²⁸³ This kind of cooperation falls under the Compact Clause.

But *Holmes* undoubtedly does *not* prohibit coordination. *Holmes* is clear that Vermont could have acted in good faith in furtherance of its own police power in expelling Mr. Holmes from the state.²⁸⁴ Vermont could have coordinated with the Canadian authorities to secure that Mr. Holmes would not re-cross the border into Vermont after having been delivered to the Canadian border.²⁸⁵ Such coordination would meet the *Holmes* test because the state would simply have chosen to act on its own, ordinary, general powers in a certain, otherwise permissible, manner.

In other words, the global governance perspective explains why Congress has not exercised its oversight power in the vast majority of apparent foreign state compacts.²⁸⁶ Most such compacts concern coordination of behavior rather than outright cooperation between

278. See Che Odom, *Tax Breaks Plentiful for Second Amazon HQ Even Without Bids*, BLOOMBERG (Mar. 26, 2018), <https://www.bna.com/tax-breaks-plentiful-n57982090371/> (“Many of the tight-lipped cities vying to become Amazon’s second home already offer incentives for economic development that would provide the online retailer with millions of dollars in tax breaks.”).

279. GLENNON & SLOANE, *supra* note 16, at 68.

280. *Id.*

281. See Che Odom, *Tax Breaks Plentiful for Second Amazon HQ Even Without Bids*, BLOOMBERG (Mar. 26, 2018), <https://www.bna.com/tax-breaks-plentiful-n57982090371/>.

282. *Holmes v. Jennison*, 39 U.S. 540, 569 (1840).

283. *Id.*

284. *Id.* at 568.

285. *Id.*

286. GLENNON & SLOANE, *supra* note 16, at 284.

states and foreign governments.²⁸⁷ Even *Holmes*, the high water mark of the foreign Compact Clause jurisprudence, would suggest that Congress has no authorizing role to play in this context.²⁸⁸ The key reason that states are constitutionally permitted to enter into global governance networks is that these networks are premised upon the exercise of existing regulatory sovereignty in the states.²⁸⁹ As the exercise of regulatory sovereignty by the states deployed through global governance networks is directed at immediately achieving a permissible goal, the foreign affairs implications of their participation in these networks, from a constitutional perspective, are secondary. States are seeking to secure that domestic policies can, first, achieve their desired ends at all and, second, better achieve them by coordinating with foreign actors. States are seeking neither to engage in foreign diplomacy, nor to secure cooperative advantages through foreign engagements. They are instead enlisting the coordination of foreign actors to achieve domestic policy ends.

What does this mean for our question, still left open in the current literature, as to when precisely federal foreign *policy* can preempt state *law*? Or inversely, what does it mean for state participation in foreign affairs through global governance networks? It means that absent Congressional or executive lawmaking action, states may remain engaged in foreign affairs up to certain constitutional limits. Centrally, *Holmes* stands for the proposition that states' coordination of their actions with foreign nations is permissible even without Congressional approval so long as the states stay within the scope of their traditional sovereign domain.²⁹⁰

B. *The Limits of State Participation: The Role of Traditional Powers*

The general constitutional permissibility of state participation in global governance networks as such is only the first step. The conclusion that states may participate in global governance networks does not entail that *every* state attempt at participation will meet constitutional muster. What, then, are the limits of state participation in global governance networks?

287. GLENNON & SLOANE, *supra* note 16, at 280 (noting the broadly coordinating function of most foreign compacts as to which Congress has not acted).

288. *Holmes*, 39 U.S. at 568.

289. Sourgens, *supra* note 41.

290. *Holmes*, 39 U.S. at 568.

The *Holmes* distinction relied upon a difference between permissible state coordination and potentially impermissible state cooperation with foreign actors under the Compact Clause.²⁹¹ This distinction, discussed in the last section, assumes implicitly that the state had the authority to regulate the subject matter at issue in the absence of coordination.²⁹² If the state lacked this authority, it could not use global coordination as a means to expand its powers.

The more recent Compact Clause case *U.S. Steel Corp. v. Multistate Tax Commission*,²⁹³ addressing an interstate (as opposed to a foreign) Compact, makes this assumption express. *U.S. Steel Corp.* concerned the Multistate Tax Compact (MTC). Pursuant to the MTC, the states had set up a Commission to promote uniformity and compatibility in state tax systems.²⁹⁴ The state participants had failed to secure Congressional approval for the MTC, leading to the challenge.²⁹⁵ The *U.S. Steel Corp.* Court held that MTC did not trigger the Compact Clause because the “pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence. Nor is there any delegation of sovereign power to the Commission.”²⁹⁶

It is thus possible to combine *Holmes* and *U.S. Steel Corp.* Pursuant to *Holmes*, a state may coordinate its actions with a foreign counter-party. *U.S. Steel Corp.* adds that states are simply prohibited from invoking the network as justification “to exercise any powers they could not exercise in its absence.”²⁹⁷

The question whether a state was entitled to act in the first place, even in the absence of a global governance network, is a useful heuristic. Its answer is not, however, a binary rubric. In many instances, the actions of the state involve complex webs of regulatory concerns that cannot easily be divorced from their global context. The analysis thus risks becoming circular: states may act with regard to matters impacting foreign affairs to the extent they have the authority to impact foreign affairs. Any such analysis would beg the question, as it would assume the authority it set out to discover.

291. See Section III.A.

292. See *id.*

293. 434 U.S. 452 (1978).

294. *Id.* at 456.

295. *Id.* at 454.

296. *Id.* at 473.

297. Compare *id.* with *Holmes v. Jennison*, 39 U.S. 540, 568 (1840) (state action consistent with police powers is permissible).

Holmes again provides a useful starting point for this more complex analysis. Thus, in the words of that decision, “[t]he state does not co-operate with a foreign government not [sic] hold any intercourse with it, when she is merely executing her police regulations.”²⁹⁸ The closer the link between a state’s conduct and its police powers, the stronger its claim to coordination through global governance networks without requiring any Congressional approval for its actions.

This concern for police powers as the limit of permissible state conduct must be viewed in the historical context that gave us *Holmes*. In this context, police powers denoted the role of the state “to take care of the community more broadly.”²⁹⁹ Specifically, it required keeping the public peace, providing for public health, securing the means of economic prosperity, and protecting public morals within the community.³⁰⁰ The state traditionally, in other words, may act for the common welfare of its residents.³⁰¹

This rubric of appraising state conduct through the lens of historical police powers can make sense of the frequently criticized decision in *Zschernig v. Miller*. As discussed above, *Zschernig* involved an Oregon law that disqualified heirs from inheriting to the extent that the laws in their home states did not effectively recognize the right to private property.³⁰² The case arose after the death of Oregonians who had died intestate.³⁰³ The heirs of the Oregonians at issue were East German residents who were prevented by the Oregonian statute to inherit, leading the property to escheat to Oregon.³⁰⁴ The Supreme Court concluded that Oregon impermissibly encroached upon the foreign policy prerogatives of the federal government by making value judgments about the desirability of communism and the right to hold private property.³⁰⁵ The decision has been heavily criticized in the foreign affairs literature for the reasons already outlined in Section I. Importantly, it has also been treated as

298. *Holmes*, 39 U.S. at 568.

299. Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 763 (2007).

300. *Id.*

301. *Id.* The state must stay within its zone of competence set out by the dormant commerce clause. The concern here is, however, domestic, i.e. interstate commerce rather than some additional scrutiny imposed by international commerce clause concerns. *See* Section I.

302. *Zschernig v. Miller*, 389 U.S. 429 (1968).

303. *Id.* at 430.

304. *Id.*

305. *Id.* at 441.

inconsistent with current jurisprudence that is more permissive of state action in the realm of foreign affairs.³⁰⁶ If *Zschernig* could be integrated into a broader framework that could also yield permissive results based upon context, it would thus be possible to provide a theory that is descriptively more encompassing—a theory that identifies aspects of jurisprudence that the current frames of reference may not fully appreciate.

To make sense of this decision in the *Holmes* framework of police powers, it is important to situate where on the police power spectrum the Oregon law would fit. The short answer is that it does not fit at all. The provision does little to nothing to protect the public welfare of Oregonians. As the *Clark* decision reached earlier in light of California legislation makes clear, states may in fact require reciprocity from foreign countries in the probate context.³⁰⁷ They thus may protect the rights of their own (Californian or Oregonian) residents to inherit abroad by making foreign inheritance conditional upon reciprocity and thus encourage foreign jurisdictions to permit their own (Californian or Oregonian) residents to inherit in turn.³⁰⁸ The Oregonian provision barring inheritance on the basis of political creed does little to advance this interest further.

As the law does not provide any tangible benefit to Oregonian residents, this leaves the protection of public morals as the only traditional police power reason for the Oregonian provision preventing an Eastern German national to inherit on the basis of his home state laws.³⁰⁹ But the existence of communist laws abroad does not directly affect public morals *in Oregon*. To the contrary, any attempt by Oregon to impose its public morals in East Germany would violate the principle of sovereign equality that “[e]very State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.”³¹⁰ The relationship of the Oregon law to traditional police powers therefore is tenuous at best, and an internationally wrongful intrusion upon sovereign equality at worst. It thus invites precisely the

306. Sitaraman & Wuerth, *supra* note 25, at 1918.

307. *Clark v. Allen*, 331 U.S. 503, 506 (1947).

308. *Id.*

309. See Legarre, *supra* note 299, at 763 (listing police powers).

310. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 123, U.N. Doc. A/8082/Annex (1970).

kind of functionalist rationale adopted by the *Zschernig* court.³¹¹ But even *Zschernig* was not defined by this rationale but instead also rested on a more traditional appraisal of state police powers.

This does not mean that the state may not act to give voice to deeply held public moral commitments. The *Crosby* decision, discussed above, in principle confirms that states have the power of the purse to bar state entities from buying goods or services from companies acting in jurisdictions that the state wishes to boycott.³¹² Absent affirmative obstacles placed in its way by federal law, the state may follow reasons of public morals to spend its money as it sees fit.³¹³ The decision in *Garamendi* also showcases that the state may have a regulatory interest in demanding regulatory disclosures consistent with its public morals-based goals.³¹⁴ In both cases, it would be fair to infer that state laws would have survived scrutiny in the complete absence of *any* federal action. These decisions thus, intriguingly, are a departure from both the rationale and language of *Zschernig* without being necessarily inconsistent with its underlying operational logic.³¹⁵

In short, the police power rationale for permissible coordination by states through formal or loose global governance networks, developed through a careful reading of *Holmes*, holds up against a review of the key foreign affairs cases that have given the literature a reasonable amount of difficulty.³¹⁶ It highlights that this coordination is always a matter of means and degree: no area of state conduct is *per se* unconstitutional, even if certain means chosen by a state may well stray outside of traditional police powers. States, therefore, may participate in global governance networks as a categorical matter. They are, however, limited by their traditional powers in coordinating their actions consistent with these networks. Whether the means chosen to coordinate their actions are permissible will require a granular analysis of the law or regulation in application. And a

311. Sitaraman & Wuerth, *supra* note 25, at 1918.

312. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 367 (2000).

313. *Id.*

314. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 399 (2003).

315. See Sitaraman & Wuerth, *supra* note 25, at 1921 (“And while the Court in *Crosby v. National Foreign Trade Council* held that Massachusetts’ sanctions on Burma were preempted by the federal sanctions regime, some scholars immediately viewed the opinion as notable for its failure to rely on exceptionalist arguments.” (citations omitted)); see also Michael Reisman, *Myth System and Operational Code*, 3 YALE J. INT’L L. 230, 231 (1977) (defining operational code as “the unofficial but nonetheless effective guideline for behavior” in contradistinction to a myth system of the “norm system of the official picture”).

316. *Holmes v. Jennison*, 39 U.S. 540, 568 (1840).

decision that one choice strays beyond permissible boundaries does not mean that the state may not act in other ways to give voice to the same internalized global norms.

C. *Balancing Considerations*

Not all state exercises of police powers are created equal. And foreign policy decisions are not interchangeable variables. Rather, state police powers and foreign policy decisions, respectively, exist on a continuum. The jurisprudence reflects this basic, contextual reality.

On the side of police powers, the Court's jurisprudence already foreshadows skepticism regarding the more adventuresome state forays into foreign policy. As discussed in the previous section, *Zschernig* is consistent with the view that the tacit imposition of Oregon public morals upon a foreign state was beyond the scope of a state's police powers.³¹⁷ But *Garamendi* and *Crosby*, too, reflect a similar attitude on the reasonable limitation of state authority.

In *Garamendi*, it is hard to avoid the conclusion that the Holocaust Victim Insurance Relief Act (HVIRA) has the thinnest of connections to California: on its face, it addresses claims accruing in *Europe*;³¹⁸ the underlying policies were issued in Europe between 1920 and 1945;³¹⁹ and it reaches *affiliates* of companies currently doing business in California, rather than only companies doing business in California themselves.³²⁰ The regulatory interest would certainly have been greater if the law concerned California policies or more directly implicated California claims. As is, the current link of decades-old insurance products to California appears more pretext than regulatory necessity to secure the stability of the California insurance market.

Similarly, in *Crosby*, while the state has an indubitable interest in spending public moneys consistently with public morals, the inclusion in the Massachusetts Burma Law's boycott of products and services provided solely on account of corporate affiliation seems to stretch the police power rationale to the breaking point.³²¹ It is certainly reasonable that Massachusetts did not want to purchase products or services that came directly from or through Burma (contemporary

317. *Zschernig v. Miller*, 389 U.S. 429, 435 (1968).

318. *Garamendi*, 539 U.S. at 409–10.

319. *Id.*

320. *Id.*

321. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 382 (2000).

Myanmar). It is less reasonable to extend this concern to any products and services simply because of corporate co-ownership of another affiliate doing business in Burma.³²²

Conversely, both cases also involved areas in which the executive traditionally has had significant foreign policy authority. Claim settlements are a traditional subject matter for sole executive agreements.³²³ They also lend themselves to a functionalist view, borrowed from international law, that the national executive, and only the national executive, can in fact release claims on the international plane.³²⁴ The underlying concern in California's regulation was that Holocaust-era claims be settled fairly, as the name of the law already implies.³²⁵ This concern thus shaded into an area traditionally reserved to other actors.

Similarly, the question of economic sanctions is a matter of federal concern, at least from a functional, if not from a textualist, perspective. As one recent study argues, economic sanctions directed at foreign states are the modern day substitute for warfare.³²⁶ This would suggest a functional rationale to assign responsibility for such conduct to the federal government—even if the historical novelty of the means would fit only uneasily over the text of the Constitution.³²⁷ The forays by states to try their hands at economic sanctions targeting companies doing business with foreign states come perilously close to an importantly federal domain.³²⁸

A balance of traditional state police powers against traditional federal foreign affairs powers thus allows a clearer view of what the jurisprudence actually does; such a view is also doctrinally consistent with the Compact Clause. The weaker the link between traditional police powers and state conduct, the more probable it is that the state

322. *Id.*

323. Harold Hongju Koh, *Twenty-First-Century International Lawmaking*, 101 GEO. L.J. 725, 732 (2013) (discussing *Pink* and *Belmont*). There is an “exceptionalist” justification in international law for this assignment of responsibilities as claim settlements are a traditional area for executive commitments be it through unilateral acts or by means of the conclusion of a treaty. For a discussion of why this exercise of authority is “exceptionalist” in the U.S. context, see Sitaraman & Wuerth, *supra* note 25, at 1915. For a historical discussion of unilateral actions by the President, see Sourgens, *supra* note 41, at 22–34.

324. David Leys, *Diplomatic Protection and Individual Rights: A Complementary Approach*, 57 HARV. INT'L L.J. ONLINE 1, 4–6 (2015).

325. *Garamendi*, 539 U.S. at 409–10.

326. HATHAWAY & SHAPIRO, *supra* note 36, at 388–89.

327. *Id.*

328. *Id.*

is acting in a manner inconsistent with the federalist equilibrium. The stronger the traditional federal competence with regard to the area in question, the stronger the claim to federal supremacy. This means that any action by the federal government that is not easily harmonized with state law at the extreme end of the spectrum of both axioms (traditional police powers vs. traditional federal competence) would thus present an instance in which foreign policy would trump state law. At that end of the spectrum, it would not matter whether the federal government acted pursuant to an executive agreement (as it did in *Garamendi*), acted in the scope of its foreign policy discretion (as provided by Congressional legislation in *Crosby*), or acted to reverse course consistent with its mandate.

The Court has been mindful of these broader realities its treatment of state laws. It has not drawn bright line rules prohibiting states from participating in global governance networks or internalizing international norms into their respective laws. But neither has it given states a blank check. Rather, it has weighed the respective state and federal sovereign interests against each other in demarcating the proper scope of state coordination and internalization of international norms. Given the Court's current near-allergic reaction to making sweeping bright line pronouncements, this is unlikely to change in the near future as a descriptive matter.³²⁹

As a normative matter, commentators have submitted that such a balancing test is undesirable. They argue that “[a]d hoc judicial judgment based on particular factual situations would seldom be susceptible to generalization. It would be difficult for state officials to predict what would fall on one side of the line or the other, potentially wreaking havoc on federal-state relations.”³³⁰ The transnational legal process lens casts more than some doubt on this assertion. State and federal officials are engaged in overlapping webs of global governance networks.³³¹ As network participants, they each answer to the frictions created by the other—and frequently intend to do so.³³²

329. Dahlia Lithwick, *The Supreme Court Is Not Going to Save You*, SLATE (June 18, 2018), <https://slate.com/news-and-politics/2018/06/in-gill-v-whitford-and-benisek-v-lamone-john-roberts-supreme-court-shows-its-too-afraid-to-do-anything.html>; Eugene Volokh, *The Year of the Punt, or At Least the Bunt*, THE VOLOKH CONSPIRACY (June 18, 2018 11:04 am), <http://reason.com/volokh/2018/06/18/the-year-of-the-punt-or-at-least-of-the>.

330. GLENNON & SLOANE, *supra* note 16, at 135.

331. *See* Section II.

332. *Id.*

They are using policy tools strategically to advance their own norm internalizations over rival norm internalizations.³³³

A balancing test is alive to the fact that the assertion of state legislative power is a communicative act in this larger conversation. As will become even more apparent in the next section, by balancing state against federal concerns, a balancing test takes this exchange seriously as a dialogue or conversation rather than exclusively listening to one side. By considering both sides to federal-state relations seriously, this balancing test thus protects these relations *as* relations rather than imposing hierarchical norms that would make engagement—that is, relationships—impossible. It thus again confirms that while state participation in global governance networks is presumptively constitutional, some of the results of state participation may well not pass constitutional muster.

This balancing test, moreover, can explain another potentially perplexing schism in the foreign affairs law literature. The foreign affairs law literature currently claims both that there is an increase in foreign affairs exceptionalism—the position that foreign affairs decisions are constitutionally different from other, domestic matters of constitutional concerns on functionalist grounds—and a trend towards foreign affairs normalization.³³⁴ On its face, it would appear that both literatures could not inhabit the same legal universe.

The balancing test for the appraisal of state conduct in global governance networks oddly confirms that that *both* camps are correct. Traditional federalism questions have increasing currency in decisions applying facially to foreign affairs disputes precisely because globalization has forced an ever-greater intrusion of “foreign affairs” into our daily lives.³³⁵ As states have a role to play in setting their own agendas in these areas pursuant to their traditional police powers,

333. *Id.*

334. Compare Sitaraman & Wuerth, *supra* note 25, at 1897 (arguing that “the Supreme Court has increasingly rejected the idea that foreign affairs are different from domestic affairs. Instead, it has started treating foreign relations issues as if they were run-of-the-mill domestic policy issues, suitable for judicial review and governed by ordinary separation of powers and statutory interpretation principles”) with David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583 (2017) (submitting a re-appraisal of exceptionalism in the immigration context) and GLENNON & SLOANE, *supra* note 16, at 300 (“[F]ew other issues [other than immigration] . . . as starkly pose one of the core tensions within foreign affairs federalism.”).

335. See Jan Dalhuisen, *Globalization and the Transnationalization of Commercial and Financial Law*, 67 RUTGERS U. L. REV. 19, 21 (2015) (discussing the global trade implications for everyday consumer goods).

foreign affairs look a lot more like domestic affairs, as the literature has noted.³³⁶ At the same time, however, the executive has become ever more adept at using its own traditional foreign affairs powers, enjoyed as a matter of international law, to drive policy, including policy with significant domestic repercussions.³³⁷ This has given rise to a justifiable impression of greater foreign affairs exceptionalism.³³⁸ Importantly, both trends currently co-exist and consequently cannot be read apart from each other. Exceptionalism and normalization are thus flip sides of the same coin, the difference between them merely a matter of which perspective one uses to approach constitutional balancing. The fact that both co-exist in the literature thus again supports that a balancing test is the descriptively most apt rubric to capture the current state of the law, pace the normative qualms raised by some.

D. *Framework Agreements*

Professor Sloss places an important obstacle in the way of formal state coordination through formal global governance networks and state participation in transnational legal processes. He notes that there is some support for requiring Congressional approval for state compacts that commit a state to participate in a network for a fixed period of time.³³⁹ He looks in particular to the Linking Agreement between California and Quebec, which provides in relevant part that a “party may withdraw from this Agreement by giving 12 months notice to the other party.”³⁴⁰ Such a provision could not be revoked by the state at its discretion.³⁴¹ This would run afoul of the state’s “unfettered power to withdraw” from the network and thus would again require Congressional approval.³⁴²

The potential obstacle that Sloss identifies is important. The agreements formalizing global governance networks frequently

336. Sitaraman & Wuerth, *supra* note 25.

337. Bradley & Goldsmith, *supra* note 26, at 1253.

338. *Id.* at 1253–54.

339. Sloss, *supra* note 123, at 524–25.

340. Agreement Between the California Air Resources Board and the Gouvernement du Québec Concerning the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions, art. 16, CAL. AIR RES. BD. (Sept. 27, 2013), https://www.arb.ca.gov/cc/capandtrade/linkage/ca_quebec_linking_agreement_english.pdf [hereinafter California-Quebec Agreement].

341. Sloss, *supra* note 123, at 524–25.

342. *Id.* (quoting Applicability of the Compact Clause to Use of Multiple State Entities Under the Water Resources Planning Act, 4B Op. Off. Legal Counsel 828 (1980)).

include termination provisions intended to signal that the network is not purely *ad hoc* in nature.³⁴³ If the inclusion of such provisions *per se* would require Congressional approval, many formal global governance mechanisms would be beyond the independent reach of the states.

The first question, therefore, becomes whether the requirement that Sloss identifies is otherwise consistent with the frame developed thus far. Significantly, the jurisprudence Sloss relies upon is in fact consistent with the coordination/cooperation distinction developed on the basis of *Holmes*, in the foreign state compact context above, and draws expressly upon *U.S. Steel Corp.*³⁴⁴ Sloss focuses in particular upon a passage in *U.S. Steel Corp.* in which the Court held that “each State retains complete freedom to adopt or reject the rules and regulations of the Commission. Moreover, as noted above, each State is free to withdraw at any time.”³⁴⁵

Given this overall overlap in the analytical frame between *U.S. Steel Corp.* and *Holmes*, Sloss’s reading of *U.S. Steel Corp.* thus raises the question whether a framework agreement setting up an otherwise coordinative global governance network becomes cooperative in nature simply by including a termination provision, like the California-Quebec Linking Agreement.³⁴⁶ Luckily for state participation global governance networks, this is by no means a foregone conclusion.

In the context of the Linking Agreement Sloss analyzes, it is central to understand the consequence of non-compliance with any term of the agreement—including its termination provisions. This consequence is spelled out in Article 18, entitled “Resolution of Disputes.”³⁴⁷ This mechanism calls for consultations between the parties “using and building on established working relationships.”³⁴⁸ Failure to abide by the termination provision does not trigger any enforceable legal right under the Agreement.³⁴⁹ Rather, Quebec’s potential complaint that California failed to coordinate is only fruitful

343. This was one of the reasons for such a provision in the Paris Agreement. *See* Sourgens, *supra* note 41, at 111.

344. Sloss, *supra* note 123, at 524–25.

345. *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 473 (1978).

346. Sloss, *supra* note 123, at 524–25.

347. California-Quebec Agreement, *supra* note 340, at art. 18.

348. *Id.*

349. *Id.*

if California wishes to continue to coordinate in accordance with the dispute resolution provision in Article 18.

The dispute resolution provision thus ensures that neither party bargained for the continued coordination by the other in exchange for its own continued coordination. The Agreement works if, and only if, all participants wish to engage each other. Agreements worded in this manner would tend to pass muster under both *Holmes* and *U.S. Steel* despite the exit provision precisely because states cannot be forced to coordinate.³⁵⁰ Signatories of formal agreements constituting a governance network, including state signatories, thus can include provisions requiring fixed withdrawal periods so long as a failure to abide by them does not give rise to justiciable or enforceable rights. The exit provision in those instances is hortatory and expresses a permissible desire to coordinate, rather than an impermissible commitment to do so.

E. *Conclusion*

Where does this leave us? As a general rule, there is no constitutional obstacle to state participation in global governance networks. There is thus no *per se* obstacle to state resistance to federal foreign policy through participation in global governance networks. The balancing test pitting traditional state police powers against traditional federal foreign affairs competence creates a more granular perspective on how states may participate in foreign affairs. It also creates a less clear picture of how or when they may do so and how the federal government might respond to preempt or limit state forays.

The balancing test drawn up through the global governance perspective also leads to another surprising result. It possible to read consistently jurisprudence that the literature has suggested is incongruous. Principally, it is possible to account for the Supreme Court decisions in *Zschernig* and *Garamendi* that are typically associated with an exceptionalist view of the special nature of foreign affairs questions, together with a view that is more permissive of state participation on traditional federalism grounds in foreign affairs.³⁵¹ It is therefore possible to reconstitute a fuller picture of constitutional tradition than was previously possible. The next section will lay this

350. *U.S. Steel Corp.*, 434 U.S. at 473; *Holmes v. Jennison*, 39 U.S. 540, 568 (1840).

351. *Sitaraman & Wuerth*, *supra* note 25, at 1913.

new rubric over the states of resistance in Section II to seek to establish whether the state of resistance developed in Section II is itself constitutionally relevant or predictive of how much deference federal executive foreign policy (and particularly a foreign policy of disengagement) will command in the face of inconsistent state law.

IV. REMAPPING NETWORK CONFLICTS

The Article so far has developed two rubrics to understand how state entry into the transnational legal process creates resistance to federal foreign policy. Section II outlined how states create different types of resistance through their participation in global governance networks. Section III outlined which constitutional constraints the Compact Clause places on state conduct in global governance networks. This section now combines both perspectives and asks two questions. First, what are the preconditions for the states to be constitutionally permitted to resist foreign policy? Second, what can the federal government do to overcome this resistance?

A. *Check on Defection*

The most topical resistance by states to federal foreign policy is to act as a check on defection by the federal government from global governance networks. When may a state act as such a check on defection? Section III has outlined that the state must have an ostensible reason to legislate or regulate grounded in its own police powers.³⁵² It thus must act to protect the public safety and welfare of its residents.³⁵³ Alternatively, it can attempt to use its spending powers as a means to implement policy.³⁵⁴

In the context of California's recent actions to challenge the Trump administration's announced defection from the Paris Agreement, the first question is whether California has any independent police power rationale to implement its own climate rules. As a coastal state with a high population density and drought-induced wildfires responsible for billions of dollars in property damage, California's interest in climate regulation is hard to write off as pure pretext.³⁵⁵

352. See Section III.A–B.

353. See Section III.B.

354. *Id.*

355. Brian Clark Howard, *5 Key Threats to California from Climate Change*, NAT'L GEOGRAPHIC (Aug. 12, 2014), <https://news.nationalgeographic.com/news/2014/08/140812->

This leaves the additional question: whether the federal environmental law framework has preempted all climate regulation by California. The answer again is “no.” By its terms, the principal law at issue in preempting state environmental laws on climate change, the Clean Air Act, does not preempt state action with regard to the environment as a categorical matter.³⁵⁶ While the Clean Air Act grants considerable discretion to a federal agency, the Environmental Protection Agency, this discretion is not absolute.³⁵⁷ California thus has regulatory authority and may exercise this regulatory authority by coordinating with foreign states to achieve California’s goal of mitigating greenhouse gas emissions and thus protecting the welfare of Californian residents.

This further leaves the question of how the federal government can act nevertheless to preempt unwelcome state regulation resisting defection. If the state regulatory interest has a relatively thin basis in state police powers, a mere statement of foreign policy to exit from existing mechanisms may suffice to stop state action under the balancing test developed in Section III. By analogy to *Garamendi*, the federal government prevailed on a mere statement of foreign policy rather than preemption through an executive agreement.³⁵⁸ Such policy statements should prevail irrespective of whether federal foreign policy is to engage in greater cooperation with foreign states, as was the case in *Garamendi*, or the opposite.

If the state has a legitimate police powers argument and its ability to regulate a subject matter has been well-established, as is the case in the context of the Clean Air Act, the federal government would have

california-climate-change-global-warming-science/#close.

356. 42 U.S.C. § 7416 (2018) (“Except as otherwise provided in sections 1857c–10(c), (e), and (f) (as in effect before August 7, 1977), 7543, 7545(c)(4), and 7573 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.”). See also JJ England, *Saving Preemption in the Clean Air Act: Climate Change, State Common Law, and Plaintiffs Without a Remedy*, 43 ENVTL. L. 701, 733–35 (discussing preemption under the Clean Air Act).

357. Lisa Heinzerling, *The Clean Air Act and the Constitution*, 20 ST. LOUIS U. PUB. L. REV. 121, 127 (2001) (discussing the Clean Air Act’s imposition of limits on EPA discretion in the context of NAAQS).

358. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 421, 424 (2003).

to do more than express a policy choice.³⁵⁹ It would need to take affirmative regulatory action either to preempt state law directly or to regulate in such a manner that the state law in question is an obvious obstacle to the attainment of the federal policy goal.³⁶⁰

In the context of defection, such regulatory action may require additional legislation beyond the attempt by the executive to pass preemptory regulations. To the extent that a prior administration has committed the United States to internationally binding obligations, a successor administration could only undo those commitments as a constitutional matter if it had express authorization from Congress to regulate in violation of international law pursuant to the *Charming Betsey* canon.³⁶¹ As discussed in the *Paris Paradigm*, federal law is presumptively read so as not violate the international legal obligation of the United States.³⁶² An executive policy of defection that violates international law thus requires express Congressional authorization to be validly promulgated.³⁶³ An invalidly promulgated regulation logically cannot preempt state law. The specter of defection thus raises the need for further Congressional action to ratify executive foreign policy.

B. *States as Allies in National Network Conflicts*

States have acted as allies in national network conflicts as discussed in the *Crosby* example relating to Massachusetts's Burma Law above.³⁶⁴ The constitutional analysis developed above is helpful in creating a rubric for how states can most effectively use their powers to take sides in national network conflicts. Most immediately, states must be careful to use an appropriate mechanism to take sides in an issue that also involves federal interests directly. Thus, the *Zschernig* decision makes clear that state laws that are grounded fundamentally in public morals of the forum state, but seek to extend those morals beyond state territory, will probably be struck down.³⁶⁵ State participation in human rights discourses, in particular, will

359. Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, 50 ARIZ. L. REV. 879, 892–910 (2008) (discussing the constitutionality of state climate change laws and regulations).

360. *Id.*

361. Sourgens, *supra* note 41, at 49–51.

362. *Id.*

363. *Id.*

364. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372, 375 (2000).

365. *Zschernig v. Miller*, 389 U.S. 429, 436 (1968).

probably to encounter this problem. As the *Crosby* decision made clear, however, the use of spending powers remains open even in these scenarios to organize a boycott in a manner that passes constitutional muster.³⁶⁶

The federal government has significantly more tools at its disposal to react to state involvement in these instances. In the first instance, Congress can pass an act to empower the executive to promulgate policy on the area in question and implement a broader Congressional mandate.³⁶⁷ This is what Congress in fact did in *Crosby*.³⁶⁸ Such Congressional action typically will receive significant deference even if it might, on its face, be possible to require compliance with both state and federal law.³⁶⁹ This deference is implicit in the fact that federal actors are already participating in global governance networks—meaning that there is probably a significant federal interest at stake. It is further inherent in many of the functionalist concerns arising out of international law, because the network conflict will have immediate repercussions on the world stage and will potentially bring about international legal liability for the U.S., as was threatened in *Crosby*.³⁷⁰

Additionally, the executive may be able rely on existing delegation of regulatory powers by Congress.³⁷¹ If the state has acted through direct legislation rather than spending powers, the federal government can simply seek to regulate the subject matter of state laws itself and thus preempt state laws as inconsistent with federal regulations.³⁷²

This means that such conflicts will be a reasonably tempting field to assert that federal foreign policy (and even federal foreign policy of disengagement) can preempt state law. The discretion afforded federal agencies in crafting a response to such national network conflicts will be reasonably expansive. In both instances, however, it is important to note that state laws cannot be preempted on foreign policy grounds as such without *any* Congressional or administrative action. Rather, it will take some further regulatory action to preempt by negative implication, as was the case in *Crosby*, meaning that state conduct will

366. *Crosby*, 530 U.S. at 372, 375.

367. *Id.* at 372.

368. *Id.*

369. *Id.*

370. *Id.*

371. David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1147–53 (2012) (discussing administrative preemption).

372. *Id.*

likely have met its underlying policy goals, namely to further engagement by federal actors with the problem in question.³⁷³ A policy of disengagement, in other words, must be clearly articulated to be given deference.³⁷⁴

C. *States as Independent Sources of Conflict*

States can enter into independent global governance networks and coordinate their regulatory actions even in the absence of any federal participation. The key question for such legislation or regulation will be whether the state can advance a plausible police power rationale for its actions.³⁷⁵ If it can do so, the foreign affairs impact of the state's conduct will not of itself create an impediment. The legislative scope of state action at issue in *Crosby* and *Garamendi* further indicates that state police powers will be broadly understood for purposes of the Compact Clause analysis.³⁷⁶

The federal government is not powerless to act in overcoming such new and independent conflicts. By their nature, however, these independent networks may well fall more squarely in the realm of traditional state police powers. This will mean that federal action will need to overcome a higher burden to preempt state law passed consistently with such independent networks. This, thus, is one area in which federal foreign policy probably will not preempt state law; it is even less probable that a federal foreign policy of disengagement would be able to achieve this end.

In this regard, independent state networks invert the scenario in which states act as a drag on new national networks. To overcome cooperative endeavors, it may well be necessary for Congress to act with sufficient specificity to preempt state law. Congress further will have to act within its enumerated powers. Such coordination, in other words, may be the most difficult for the federal government to overcome or enjoin simply because these independent state networks are the most likely to implicate core state responsibilities and more tangential federal responsibilities.

*United States v. Bond*³⁷⁷ may be a case in point. The issue in *Bond* was the Convention on Chemical Weapons and the Chemical

373. *Crosby*, 530 U.S. at 372, 375.

374. *Id.* at 372.

375. See Section III.B.

376. *Crosby*, 530 U.S. at 375; *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421, 424 (2003).

377. 572 U.S. 844 (2014).

Weapons Convention Implementation Act of 1998.³⁷⁸ *Bond* involved a federal prosecution, pursuant to the Chemical Weapons Implementation Act of 1998, of a micro-biologist who had used an arsenic-based compound to attempt to poison her friend for sleeping with her husband.³⁷⁹ The Roberts court in *Bond* ruled that the Chemical Weapons Convention Implementation Act of 1998 could be not be read to upset “the constitutional balance between the National Government and the States.”³⁸⁰ Consequently, the use of the Chemical Weapons Implementation Act of 1998 to prosecute “traditionally local criminal conduct” would be an unreasonable extension of the statute.³⁸¹

Centrally, the Court ruled that “the background principle that Congress does not normally intrude upon the police power of the States is critically important. In light of that principle, we are reluctant to conclude that Congress meant to punish Bond’s crime with a federal prosecution for a chemical weapons attack.”³⁸² This conclusion can be applied, one-to-one, to the creation of global governance networks by the states in areas that fall squarely within “the police power of the States.”³⁸³ In this area, there would be a presumption *against* Congressional authorization for federal action.³⁸⁴

This presumption against Congressional authorization mirrors the presumption against a violation of a *different* international order by Congress. The Court announced a presumption in the *Charming Betsey* case that Congress is presumed not to authorize the United States to violate international law.³⁸⁵ The *Charming Betsey* canon allows that Congress may enact a law that violates international law if it does so clearly.

This presumption may well be read after *Bond* to apply similarly to Congressional action that would violate the traditional boundaries between state and federal responsibility.³⁸⁶ Congress has the power to do so in one particular circumstance outlined in *Missouri v.*

378. *Id.* at 848.

379. *Id.* at 852.

380. *Id.* at 862.

381. *Id.* at 863.

382. *Id.*

383. *Id.* 863.

384. *Id.*

385. *Murray v. The Charming Betsey*, 6 U.S. 64, 118 (1804).

386. *Bond*, 572 U.S. at 863.

Holland.³⁸⁷ It can ratify and implement a treaty pursuant to the necessary and proper clause of the Constitution and thus supersede traditional state police powers by passing legislation ancillary to the treaty power.³⁸⁸ The point of *Bond* is that implementing legislation will be read to do so only if the legislation overcomes the presumption in question.³⁸⁹

The same presumption was at issue in *Medellin v. Texas*.³⁹⁰ There, the federal government sought to set aside capital murder convictions on the basis of a judgment by the ICJ ruling that Texas (that is, the United States) failed to abide by the terms of the Vienna Consular Relations Convention.³⁹¹ As discussed above, the Court determined that the treaty obligations did not displace Texas law as they were not self-executing.³⁹² Centrally, the *Medellin* court implicitly applied the same presumption that would later be articulated in *Bond*: federal action to displace state police powers would need to be clearly articulated in appropriate implementing legislation by Congress.³⁹³

This means that ultimately states are at their most secure when they act pursuant to their police powers in independent global governance networks (after all, the federal government has no reason to join those networks). They similarly act at their most secure when resisting federal foreign policy that encroaches upon traditional state powers. These conflicts most clearly align constitutional and global governance networks rubrics. They are thus the areas in which states may provide the most unfettered resistance to federal foreign policy—and to federal law.

D. *Amplitude Conflict and Preemption*

This leaves amplitude conflicts between states and the federal government. These conflicts in many ways leave states in their weakest position. They involve state resistance to existing federal law or regulation. Such conflicts thus directly trigger preemption concerns because, by definition, the federal government has already promulgated rules or passed legislation regarding the subject matter

387. *Missouri v. Holland*, 252 U.S. 416 (1920).

388. *Id.*

389. *Bond*, 572 U.S. at 863.

390. *Medellin v. Texas*, 552 U.S. 491, 525–32 (2008).

391. *Id.*

392. *Id.*

393. *Id.*; *Bond*, 572 U.S. at 863.

of state law or regulation.³⁹⁴

Such conflicts will ultimately turn on a comparison of the respective regulatory interests as well as the clarity with which Congress has preempted state laws or regulations in question.³⁹⁵ If the federal government has acted in a constitutional manner, federal interests will, by definition, be well-established, because it would have acted pursuant to its constitutional powers.³⁹⁶ This would leave the question: does the authorizing statute at issue carve out a role for consistent state legislation?³⁹⁷ If it does, the state legislation or regulation further would have to be compared with the overall purpose of the federal statutory regime. A true amplitude challenge—one in which the federal government intended to halt at a certain regulatory measure—would therefore have a difficult road to travel.

Amplitude challenges are likely to result in preemption of state law on the basis of federal foreign policy—even a policy of disengagement. Absent a clear statutory authorization for states to impose standards independent from federal regulation, federal policy will likely receive deference.³⁹⁸ This deference applies both to regulation *actually* promulgated by the federal government and regulation that has *not* been implemented as a policy tool.³⁹⁹ Administrative preemption and other federal administrative policy tools, in other words, are likely to swallow amplitude conflicts due to administrative delegation doctrine.⁴⁰⁰

An amplitude challenge can still play an important role in generating policy debate. Even in this context, federalism challenges typically occur *after* the state law or regulation has been promulgated.⁴⁰¹ This means that the merits of the state regulation—and the nature of its tailoring to meet specific traditional state police powers concerns—would have to be litigated. Such litigation will

394. See Section II.

395. See Section III.C.

396. U.S. CONST. art I.

397. As discussed, the Clean Air Act does so in important respects. 42 U.S.C. § 7416 (2018).

398. See Miriam Seifter, *Federalism at Step Zero*, 83 FORDHAM L. REV. 633, 637 (2014) (“Federalism values can be considered effectively, and with fewer negative consequences, in the more encompassing reasonableness analysis that courts perform in the ordinary two steps of the Chevron framework, and in arbitrary and capricious review.”).

399. See *id.* at 648 (outlining how federal agencies can curb state discretion through preemption and other tools).

400. *Id.* See also Rubenstein, *supra* note 371, at 1147–53 (discussing administrative preemption).

401. See Rubenstein, *supra* note 371, at 1147–53 (discussing administrative preemption).

highlight sensitive policy concerns as well as create a record for future administrative rulemaking procedures. Even a doomed state foray may thus keep alive a policy discourse in ways that will affect future rule making by federal authorities.

E. *Conclusion*

The states of resistance mapped in Part II each fit differently over the constitutional rubrics developed in Part III. In combination, the transnational legal process literature and the Compact Clause jurisprudence develop a coherent theory of how states can act as constituent participants in transnational legal processes.⁴⁰² This theory can answer the question left open by the existing literature: whether a federal foreign policy of disengagement can preempt state law and policy of global engagement through global governance networks.

This answer is nuanced and takes into account the different types of resistance and the relative interests of states and federal actors in pursuing their respective policies. It further depoliticizes the foreign affairs rubrics from the specifics of the underlying state law at issue and thus provides a meaningfully value neutral means to appraise the state-federal government conflict. Finally, it provides a further analytical means to drill down deeper into the foreign affairs jurisprudence and find surprising dynamics of continuity across seemingly inconsistent case law. It thus can make sense of when and how the federal government will receive significant deference for policy statements to overcome state law, while at the same time making sense of instances in which even implementing legislation passed by Congress under its treaty powers will not upset settled state law in other regards.

The Article so far does more than answer the original question of whether foreign policy—particularly a negative foreign policy of disengagement—can preempt inconsistent state law. It provides a map of state participation in the dynamics of global life. This is important. In the words of Professors McDougal, Lasswell, and Reisman,

The internal process of decision is affected by the complexities of a division of institutional practice that strikes a variable balance between territorial centralization and decentralization, and degrees of pluralization. The bureaucratic and coalitional nature of

402. Myres S. McDougal, Harold D. Lasswell, & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253, 262 (1967).

contemporary society and government permits the development of subloyalties and idiosyncratic value goals in different sectors of society and departments of government.⁴⁰³

States are truly constitutive actors on the international stage. They fulfill an important role and have a significant amount of autonomy in transnational legal discourses. The map developed so far is a sketch of just these complexities and balances. It shows that states act as a check of federal power in foreign affairs and can serve as both a negative check and a positive impetus for U.S. participation in global affairs. It also outlines the limits of this power and the manner in which these limits create independent dynamics for global governance that have not so far been fully theorized. This leaves the question of whether these dynamics have independent value and, if so, what this value is.

V. THE CONSTITUTIVE VALUE OF STATES OF RESISTANCE

In the current political climate, it is tempting to think that the value of state participation in global governance networks is to act as a guardian of last resort.⁴⁰⁴ As this final part will outline, this is certainly one important value of state participation in global governance networks. It is, however, not the most transformative aspect of introducing states as constitutive actors on the global stage. Rather, the core value that states play is to provide a means to apply transnational legal process *to* competing global governance networks within a single polity.

This core value of state participation has two momentous consequences. In the first instance, it creates instances of confrontation and engagement with and *between* the diverse values of global governance networks within a single polity. It thus creates new opportunities for the transnational legal process to function outside of a single global governance network.⁴⁰⁵ Second, the presence of irritants or states of resistance to dominant understandings of transnational legal process within a national community also serves a broader integrating role for transnational legal processes themselves.

403. *Id.* at 263–64.

404. Koh, *supra* note 9.

405. Koh, *supra* note 135, at 2618.

A. *Inverting the Rule of Exception: States as an Antidote to Executive Control*

Much ink has been spilled on the increasingly aggressive role played by the President in making international law around Congress. Curtis Bradley and Jack Goldsmith, in particular, in a recent article submitted that the Executive, and particularly the President, had assumed too great of a control over international lawmaking processes.⁴⁰⁶ Part of this argument is a direct consequence of the partisan gridlock in Congress, which would make it nearly impossible for a president to command the supermajority needed in the Senate (and depending upon the international lawmaking enterprise, in the House of Representatives) to follow ordinary constitutional processes for international lawmaking.⁴⁰⁷

As the contemporary political environment so frequently invites comparisons to late 1920s and early 1930s Germany, this inability of democratic processes to function would conjure up the picture of executive rule-by-decree by the German Reichspresident and the eventual demise of democratic processes altogether.⁴⁰⁸ The arrogation of previously legislative power by the executive thus has worrying precedents in recent history.

These worrying precedents have a common intellectual father in Carl Schmitt.⁴⁰⁹ Schmitt was the leading legal apologist for the increasingly dictatorial regime in Germany at the end of the Weimar Republic and into the Third Reich.⁴¹⁰ Drawing in part on German philosopher Friedrich Nietzsche, Schmitt focused on the point of decision and argued that decision is ultimately dictatorial in the sense that some *one* person or entity must decide.⁴¹¹ Schmitt sought to prove this dictatorial nature of constitutional decisionmaking by focusing on

406. See generally Bradley & Goldsmith, *supra* note 26.

407. See *id.* at 1260 n. 273 (relating the literature on the desirability of presidential action to theories about administrative action in light of Congressional gridlock).

408. See Howard Wasserman, *When the Nazis Became "The Nazis,"* PRAWFSBLAWG (June 23, 2018 at 11:05 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2018/06/when-did-the-nazis-become-the-nazis.html> (drawing the Trump/ National-Socialist comparison); Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 93 (2018) (outlining the Weimar threat).

409. See MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS, THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* 413-94 (2001) (discussing Schmitt in the context of his intellectual tradition).

410. *Id.* at 430.

411. Adam Thurschwell, *Specters of Nietzsche: Potential Futures for the Concept of the Political in Agamben and Derrida*, 24 CARDOZO L. REV. 1193, 1219 (2003).

states of exception or emergency.⁴¹² He submitted that all constitutions ultimately could be boiled down to this exceptional or emergency rule precisely because those moments identified who the one person with final decisional authority in a political system is.⁴¹³ The exception thus is not an isolated emergency but the foundational norm upon which an entire constitutional system stands.⁴¹⁴

If one were to follow the Schmittian analogy to the end, the arrogation of foreign affairs powers by the executive identified by Bradley and Goldsmith reveals a moment of exception.⁴¹⁵ The Presidency holds exceptional power, particularly when all other means of legal engagement fail due to gridlock.⁴¹⁶ The Presidency, in Schmittian terms, thus has quasi-dictatorial powers beyond domestic constitutional review to act on the global stage.⁴¹⁷

The arrival of states on the global stage, particularly in exceptional moments of federal defection from global governance networks, puts a significant damper on this conception of executive power.⁴¹⁸ Contrary to the Schmittian dictator, executive decision remains vulnerable to challenge and further litigation in the federal courts and deliberation in state and federal administrative agencies.⁴¹⁹ The Presidency, therefore, does not have the last word or ultimate decisionmaking power at all.

Interestingly, the availability of outright state resistance in the face of (some) federal defection from global governance networks again empowers Congress.⁴²⁰ If we follow Schmittian analysis of placing the power of decision in the body that ultimately must cut through the knot of indecision, the analysis outlined in this Article clearly points to Congress as the only body able to do so.

The arrival of states as a counterweight to the federal executive therefore achieves organically what Bradley and Goldsmith seek to advocate by means of reform proposals: the return of Congress as the

412. CARL SCHMITT, *POLITISCHE THEOLOGIE* 42 (1934).

413. *Id.*

414. *Id.*

415. Bradley & Goldsmith, *supra* note 26, at 1260. Notably, Bradley & Goldsmith argue against this rationalization of presidential powers but nevertheless provide a powerful descriptive account of its apparent use.

416. *Id.*

417. SCHMITT, *supra* note 412, at 42.

418. *See* Section IV.A.

419. SCHMITT, *supra* note 412, at 42.

420. *See* Section IV.A.

ultimate democratic decisionmaking organ even in matters of foreign affairs.⁴²¹ Until Congress acts, the resistance by states is an important retardant of federal executive action that subjects federal executive action to the same kind of political forces of electoral gridlock affecting Congress.⁴²² State participation in global governance networks and the states of resistance they can generate therefore go a long way towards defusing the specter of Schmittian foreign affairs decisionalism conjured in the literature.

B. *Creating Engagement – States of Resistance as Instances of Re-Interpretation*

So far, the value of state participation in global governance networks appears limited to playing a spoilsport to executive overreach. Though meaningful in Schmittian terms, this would ultimately relegate the role of states to one of merely metaphysical importance. Exceptions, after all, are exceptional and thus not the ordinary concern of legal and policy process, pace the current administration.

It is therefore important to map what value the irritant of state participation in global governance networks plays in ordinary times when the federal government does not seek to defect from existing commitments. As outlined in Section II, state participation in global governance networks is not limited to instances of defection. Rather, it is a constant companion of participation by states in networks different from those in which the federal government participates. It thus creates a constant drag on federal policy even when federal policy is aimed at international cooperation.

In these ordinary situations, state participation in global governance networks and the softer resistance to federal policy is more valuable than the states' exceptional checking power. State resistance creates moments of engagement between federal and state lawmakers, as *Crosby* so amply demonstrated.⁴²³ This engagement takes the form of legal argument in litigation—but it also takes the form of mutual engagement in legislative, or in some instances notice-and-comment, procedures.⁴²⁴ These moments of engagement expose

421. Bradley & Goldsmith, *supra* note 26, at 1270–97.

422. See Section IV.

423. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

424. GLENNON & SLOANE, *supra* note 16, at 299.

each state and federal lawmaker to the norms and values that at core motivate the other's law or rule.

This exchange within existing policy processes replicates transnational legal process.⁴²⁵ It requires all actors to interpret the respective submissions upon which resistance is based.⁴²⁶ The federal government will interpret state submissions, state governments will interpret federal submissions, federal courts will weigh these submissions against each other, and so on. This process does more than result in an ultimate decision as to which policy the United States will follow with regard to a disputed measure. It showcases that there are additional values that must be taken into account when addressing policy questions at issue in global governance networks.⁴²⁷

The fact of interpretation of the various submissions significantly leads to an internalization of the heterodox values that inform parallel global governance networks in the respective other global governance network.⁴²⁸ Each participant in a global governance network will take the input from its engagement with the respective other network back to the other network participants.⁴²⁹ This in turn will cause an opportunity for interpretation to all network participants,⁴³⁰ which in turn creates a diffusion of interpretation and norm internalization brought about by resistance within the U.S. constitutional system.⁴³¹ In other words, a decision by a federal district court that a state and federal policy should continue side-by-side because they are consistent measures not preempted by federal legislation will inform policymaking outside the U.S. because federal and state participants in their respective networks will report on this result and its motivation. The networks in turn will grapple with the finding of consistency—and whether they wish to embrace and internalize it or resist it further.

Resistance within one polity to the results of global governance networks on the basis of other such networks thus forces engagement between these networks.⁴³² The conflict potential inherent in state

425. Koh, *supra* note 135, at 2602.

426. *Id.* at 2618.

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

432. See generally GRAF PETER CALLIESS & PEER ZUMBANSEN, *ROUGH CONSENSUS, RUNNING CODE* (2010).

participation in global governance networks therefore is a net good in further diffusing transnational legal values. It diffuses these values in the U.S. by exposing more policy makers to international norms they would otherwise have missed. These norms will in turn be internalized through interpretation, further strengthening the effects of the transnational legal process in fostering international norm compliance and cooperation.

VI. CONCLUSION

This Article has been able to outline a new rubric of why and how states not only may participate in global governance networks but also may actively resist federal foreign policy. The Article has done so while also reconciling key cases that were traditionally considered to be incongruous with each other. It thus has provided a detailed predictive tool for how states could align their action in the future to maximize the effectiveness of their participation in global affairs.

The Article has also pointed out that this participation by states creates an important value both in the U.S. and beyond by creating interfaces between different global governance networks. The interfaces created between different global governance networks by state resistance serve a broader purpose for international regimes. One of the inherent problems for global governance networks is that they tend to fragment the global normative landscape.⁴³³ Each network generates its own context dependent norms.⁴³⁴ These norms differ from the norms generated in other networks.⁴³⁵ These norms can frequently be inconsistent with each other.⁴³⁶ And there is ultimately no means of determining which norm is “correct,” as doing so would divorce norms from context in a manner that is made impossible by the global governance network infrastructure itself. *States of Resistance* provides a model of how these conflicts can nevertheless be resolved without the need for creating a hierarchy of networks.⁴³⁷ States can cause these different networks to engage each other and thus provide a means for the transnational legal process to work *between* transnational legal processes. This solution suggests that a flat engagement between different processes is indeed possible—

433. Fischer-Lescano & Teubner, *supra* note 199, at 1005.

434. *Id.*

435. *Id.*

436. *Id.* (“If anywhere, it is here that the notion of a ‘clash of cultures’ is appropriate.”).

437. SLAUGHTER, *supra* note 20, at 132.

and that the work to comprehend how this engagement takes place critically depends upon a proper understanding of frequently overlooked constitutive actors in world society.